IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MARK A. PULLEY
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 25-0063/AF

Crim. App. Dkt. No. ACM 40438

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL COURT CASES

RULES AND OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. **MARK A. PULLEY**, Staff Sergeant (E-5), U.S. Air Force, *Appellant.*	**SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW** Crim. App. No. 40438 USCA Dkt. No. 25-0063/AF January 15, 2025

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ERRORS ASSIGNED FOR REVIEW

I. Staff Sergeant Pulley was confined for 266 days before charges were preferred. Staff Sergeant Pulley then spent an additional 179 days in confinement before the Government brought them[1] to trial. Did this delay violate Staff Sergeant Pulley's constitutional and statutory rights to a speedy trial.

II. Whether Staff Sergeant Pulley's conviction for indecent conduct violates the First Amendment.

III. As applied to Staff Sergeant Pulley, whether 18 U.S.C. § 922 is constitutional in light of recent precedent from the United States Supreme Court.

IV. Staff Sergeant Pulley suffers from gender dysphoria. Despite repeated requests over three years, Staff Sergeant Pulley never received medical care for gender dysphoria. Did the Government violate Staff Sergeant Pulley's Eighth Amendment right against cruel and unusual punishment?

[1] Staff Sergeant Pulley's preferred pronouns are "they/them."

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter under Article 66, Uniform Code of Military Justice (UCMJ),[2] 10 U.S.C. § 866. This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On August 29-30, 2023, and September 26-28, 2023, Staff Sergeant (SSgt) Pulley was tried by a general court-martial at Malmstrom Air Force Base, Montana. R. at 1, 353. Consistent with their pleas, a military judge convicted SSgt Pulley of one charge and specification of possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and one charge and specification of attempted distribution of child pornography, in violation of Article 80, UCMJ, 10 U.S.C. § 880. R. at 648. Contrary to their pleas, the military judge also convicted SSgt Pulley of one specification of indecent conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 648. The military judge acquitted SSgt Pulley of one specification of indecent conduct. R. at 648. On September 28, 2022, the military judge sentenced SSgt Pulley to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 36 months, and to be dishonorably discharged. R. at 729-30.

[2] Unless otherwise noted, all references in this filing to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

The convening authority suspended six months of the adjudged forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Mark A. Pulley*, Oct. 28, 2022, at 1. Further, the convening authority deferred the reduction in grade and all forfeitures until the date the military judge signed the Entry of Judgement (EOJ). *Id*. Lastly, the convening authority waived all forfeitures for a period of six months for the benefit of the SSgt Pulley's spouse and two dependent children. *Id.* at 2.

This case was initially docketed with the Air Force Court on March 28, 2023. However, after a review by the Air Force Military Justice Law and Policy Division (JAJM), it was discovered that discs pertaining to Prosecution Exhibits 5, 6, and 22 were missing. *United States v. Pulley,* No. ACM 40438, 2023 CCA LEXIS 155 (A.F. Ct. Crim. App. Mar. 31, 2023) (order). Thereafter, the Air Force Court ordered the case be remanded for correction. *Id.* The case was re-docketed with the Air Force Court on April 25, 2023. Then, on October 24, 2024, the Air Force Court issued its opinion on the merits of this case, affirming the findings and sentence.

STATEMENT OF THE FACTS

The investigation of SSgt Pulley began on July 6, 2021, based on information the Air Force Office of Special Investigations (AFOSI) received from Special Agent (SA) DA of Homeland Security Investigations (HSI). App. Ex. XVIII, attach. 1; R. at 455-56. On the same day, a search authorization was issued for SSgt Pulley's

residence and person. App. Ex. XVIII, attach. 1. On July 7, 2021, SSgt Pulley's commander ordered SSgt Pulley into pre-trial confinement, App. Ex. XVIII, attach. 1. This order was executed on July 8, 2021. App. Ex. XVIII at 1. SSgt Pulley spent 266 days in pre-trial confinement before charges were preferred. *Compare* App. Ex. XVIII at 1, *with* Charge Sheet. After preferral, the Government took an additional 179 days to bring SSgt Pulley to trial; in total, SSgt Pulley was in confinement for 448 days before being tried. App. Ex. LXIII at 3.

At trial, SSgt Pulley entered mixed pleas. R. at 401. SSgt Pulley pled guilty, with exceptions and substitutions,[3] to the specifications of possession and attempted distribution of child pornography. R. at 401. SSgt Pulley pled not guilty to the two remaining specifications of indecent conduct. R. at 401. There was no plea agreement, R. at 440, or stipulation of fact in this case. R. at 406. After finding that SSgt Pulley's guilty plea was provident pursuant to *United States v. Care*,[4] R. at 444, the Government declined to prove up the excepted and substituted language for the possession charge. R. at 447. However, the Government did prosecute the indecent conduct specifications and the excepted and substituted language of the attempted distribution charge. R. at 447.

[3] While the Government had charged SSgt Pulley with possession and attempted distribution of "videos" and "digital images" of minors, respectively, SSgt Pulley pled guilty only to possession and attempted distribution of a "video of a minor or what appears to be a minor." *Compare* Charge Sheet, *with* R. at 401.
[4] 40 C.M.R. 247 (C.M.A. 1969).

Ultimately, the military judge found SSgt Pulley guilty, consistent with their pleas, of the attempted distribution and possession of a single video of child pornography. R. at 648. Contrary to their pleas, the military judge also found SSgt Pulley guilty of indecent conduct for sending a video of R.P to SA DA.

Additional facts necessary to resolve the specific errors raised are provided below.

REASONS TO GRANT REVIEW

The Air Force Court's opinion raises important constitutional questions which have not been, but should be, resolved by this Court. C.A.A.F. R. 21(b)(5)(A). Further, the Air Force Court resolved SSgt Pulley's case in conflict with clear precedent from the Supreme Court and this Court. C.A.A.F. R. 21(b)(5)(B).

I. The Government violated SSgt Pulley's constitutional and statutory rights to a speedy trial by keeping them in pre-trial confinement for 266 days before preferral and over 400 days before arraignment. This delay violated Staff Sergeant Pulley's rights to a speedy trial.

A. Additional Facts

SA DA contacted AFOSI on July 6, 2021. App. Ex. XVIII, attach. 1. On July 8, 2021—the same day SSgt Pulley was placed into pre-trial confinement—AFOSI executed a search authorization on SSgt Pulley's residence and person; AFOSI seized "24 items of digital media." App. Ex. XVIII, attach. 28. On July 22, 2021, SSgt Pulley made the first of many requests for a speedy trial. App. Ex. App. Ex. XVII at 2.

Despite being in pre-trial confinement since July 8, 2021, AFOSI did not send the seized evidence to the Department of Defense Cyber Crime Center's Cyber Forensics Laboratory (DC3/CFL) until July 27, 2021. App. Ex. XVIII, attach. 28. DC3/CFL published their digital extraction report on October 6, 2021, and AFOSI agents began reviewing that report. App. Ex. XVIII, attach. 28. Evidently it took AFOSI 142 days to review this eight-page report. App. Ex. XVIII, attach. 25; *cf*. App. Ex. XVIII, attach. 28 (showing that AFOSI did not send a follow-up request for additional analysis until February 25, 2022).

On October 20, 2021, SSgt Pulley submitted a second demand for a speedy trial; this demand went unanswered. App. Ex. XVII at 2. Then, on December 9, 2021, SSgt Pulley submitted a third demand for a speedy trial; again, this demand went unanswered. App. Ex. XVII at 2. On December 13, 2021, an exclusion of time was requested by the Government, *ex parte*, and granted to the Government, *ex parte*. App Ex. XVII at 2; R. at 232-34. On February 8, 2022, once again, the Government sought an exclusion of time, *ex parte*, which was granted, *ex parte*. App. Ex. XVII at 2; R. at 232-35. On February 23, 2022, SSgt Pulley made a fourth demand for a speedy trial; the Government did not even acknowledge receipt of this demand. App. Ex. XVII at 2. On March 21, 2022, SSgt Pulley made yet another demand for a speedy trial, which also went unanswered. App. Ex. XVII at 2.

On March 31, 2022—266 days after placing SSgt Pulley in pre-trial confinement—the Government finally preferred charges against SSgt Pulley. App. Ex. XVIII, attach. 28. But, by April 8, 2022, the Government had not yet obtained a preliminary hearing officer (PHO) for the Article 32, UCMJ, 10 U.S.C. § 832, hearing ostensibly scheduled just four days later. App. Ex. XVII at 2. Upon being notified of another potential delay, SSgt Pulley waived their right to an Article 32 hearing. App. Ex. XVII at 2-3. Referral of charges did not occur until May 4, 2022—26 days after SSgt Pulley submitted their waiver. On May 24, 2022, SSgt Pulley made their sixth demand for a speedy trial. App. Ex. XVII at 3.

Thereafter, the Government waited until May 31, 2022—27 days after referral—to request the Air Force Trial Judiciary docket the case for trial. App. Ex. XVIII, attach. 28. Importantly, this only occurred after the Defense, not the Government, sought a docketing conference from the trial judiciary. App. Ex. XVIII, attach. 28. Despite these numerous delays, the Government was apparently not ready for trial until June 15, 2022: 342 days after placing SSgt Pulley in pre-trial confinement. App. Ex. XVIII, attachs. 28, 41. SSgt Pulley was arraigned on August 29, 2022, R. at 14, and trial was held on September 26, 2022. R. at 353.

SSgt Pulley timely raised a motion to dismiss for speedy trial violations. App. Ex. XVII. The military judge applied the *Barker*[5] factors and concluded that while

[5] *Barker v. Wingo*, 407 U.S. 514 (1972).

the length of the delay was presumptively unreasonable, App. Ex. XLVI at 2, "the Government exercised reasonable diligence and Accused's [sic] Article 10, UCMJ, speedy trial right has not been violated." App. Ex. XLVI at 3.

The Air Force Court deferred to the military judge, Appendix A at 11-13, ultimately holding that the delay in this case was "reasonable." Appendix A at 14. While the Air Force Court agreed the Government demonstrated a lack of diligence, Appendix A at 12, the court ultimately defended the Government's "short" delay, stating the Government merely needed more time to review the forensic evidence. Appendix A at 14.

B. Standard of Review

The question of whether an accused was denied their right to a speedy trial is a question of law reviewed de novo. *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020).

C. Law and Analysis

This Court should grant review for two reasons. First, the Air Force Court applied the wrong standard of review, giving the military judge's decision broad discretion. This conflicts with precedent from this Court. C.A.A.F. R. 21(b)(5)(B). Second, the Air Force Court wrongly concluded that the protracted delays in this case were "reasonable." This conflicts with the precedent of this Court and the Supreme Court. C.A.A.F. R. 21(b)(5)(B).

1. Evident from its analysis, the Air Force Court used a discretionary standard of review. This was error that conflicts with this Court's precedent.

Appellate courts review speedy trial violations de novo. *Reyes*, 80 M.J. at 226. But the Air Force Court did not conduct a de novo analysis. Instead, the court relied heavily on the conclusions of the military judge, ultimately holding that SSgt Pulley was not deprived of a speedy trial. While the Air Force Court did note in its summary of the law section that review should be de novo, Appendix A at 9, the Air Force Court ultimately deferred to the military judge at least five times. Appendix A at 11-12 (reasoning that the court "agree[s]" with the military judge, with little additional analysis). Therefore, this Court should grant review. C.A.A.F. R. 21(b)(5)(B).

2. The Air Force Court's holding that the delays in this case were reasonable contravenes clearly established Supreme Court precedent and the precedent of this Court.

"[T]he right to a speedy trial 'is as fundamental as any of the rights secured by the Sixth Amendment.'" *United States v. Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022) (citation omitted). For Sixth Amendment speedy trial violations, the Supreme Court has identified a four-factor balancing test. *Barker*, 407 U.S. at 530. The factors which courts must balance are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of their speedy trial rights; and (4) prejudice to the defendant. *Id*. Military courts weigh the *Barker* factors to determine whether there is a speedy trial violation under the Sixth Amendment. *Guyton*, 82 M.J. at 154.

The Air Force Court found that the length of delay and the assertion of SSgt Pulley's speedy trial rights weighed in favor of a violation, but ultimately concluded that the delay was reasonable. Appendix A at 14. Given the facts of this case it is unclear how the Air Force Court, under a de novo review, came to this conclusion. After all, unexplained or unjustified delays weigh against the Government. *Wilson*, 72 M.J. 347, 355 (C.A.A.F. 2013). In this case, there was no justifiable reason for the 266 pre-preferral delay and the over 400-day pre-arraignment delay.

From the very outset, the Government failed to efficiently investigate the allegations against SSgt Pulley. From the date of entry into pre-trial confinement until the preferral of charges, 266 days elapsed. A review of the record demonstrates that this delay was perpetuated by persistent Government malaise. For example, it took AFOSI 142 days to review DC3's *eight-page* extraction report and seek clarity on their findings. App. Ex. XVIII, attach. 28. Further, AFOSI failed to have any of the images or videos evaluated for sexual maturity until February 25, 2022 (232 days after SSgt Pulley was placed in pre-trial confinement), despite having them as early as October 6, 2021. App. Ex. XVIII, attach. 28. This evidence makes clear that the Government failed to conduct even basic due diligence in their investigation until late February of 2022. These investigatory delays—on their own—surpass the 120 days of presumptive unreasonable delay. Making matters worse for the Government,

the sexual maturity review was apparently immaterial to its ultimate charging decision since the evaluation was not completed until *after* preferral was scheduled. *Compare* App. Ex. XVIII, attach. 28, *with* App. Ex. XVII at 2.

In his ruling, the military judge concluded that "[c]onsidering the very large volume of evidence to process, review and evaluate, the pre-charging delay in this case was reasonable." App. Ex. XLVI at 2. The Air Force Court agreed, indicating that delay for review of forensic evidence is almost always reasonable. Appendix A at 14. While some delay in extremely complicated cases may be justifiable, this is not that case. After all, it took undersigned counsel only two hours to review the sealed materials, which encompasses the vast majority of the evidence that AFOSI "reviewed" for 142 days. *Compare* Pros. Ex. 1, 4, 5, 6, and 22; App. Ex. XXXVIII, LIII, LIX, *with* App. Ex. XVIII, attach. 25.

The Government's morass continued after preferral. On March 31, 2022, the Government scheduled an Article 32 hearing for April 12, 2022. App. Ex. XVII at 2. Despite the fact that SSgt Pulley had been in confinement for 266 days at that point, the Government nevertheless failed to appoint a preliminary hearing officer as late as April 8, 2024. App. Ex. XVII at 2-3. Ultimately, SSgt Pulley waived their right to an Article 32, UCMJ, 10 U.S.C. § 832, hearing on April 8, 2024, App. Ex. XLVI at 2, but this did not motivate the Government to move any faster; after all, referral was not accomplished until May 4, 2022. Charge Sheet. It then took the

Government 26 days to refer charges even though SSgt Pulley had been in confinement for 300 days at this point. These delays, just as the pre-preferral ones, were not justified.

Even after referral, the Government's sluggishness persisted. Once referral was accomplished on May 4, 2022, the Government did not have a "ready date." App. Ex. XVII at 3. Instead, the trial defense counsel requested a docketing conference on May 24, 2022, and the Government did not send a docketing memo until May 31, 2022. App. Ex XVIII, attach. 28. Thereafter, the Government averred that they were not ready for trial until June 15, 2022: 342 days after placing SSgt Pulley in pre-trial confinement. App. Ex. XVIII, attach. 28. It stretches credulity to suggest this delay is justified absent extraordinary circumstances.

This Court has said that the Government "bears the brunt of the responsibility for the slow unfolding of [a] case" due to the Government's "morass" in prosecuting it. *Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022). But the Air Force Court did not hold the delay against the Government because the Government had a "neutral" reason for the delay. Appendix A at 14. This is contrary to this Court's precedent and the precedent of the Supreme Court: while a "deliberate attempt to delay the trial in order to hamper the defense should be weighted *heavily* against the Government," more neutral reasons "nevertheless should be considered [against the Government]

since the ultimate responsibility . . . must rest with [them]." *Reyes*, 80 M.J. at 226 (C.A.A.F. 2020) (quoting *Barker*, 407 U.S. at 531) (emphasis added).

The Air Force Court also declined to find prejudice despite ample evidence of such in the record. Appendix A at 14. This, too, was error. The Court of Military Appeals (C.M.A.) held that:

> There are three interests of defendants which the speedy trial right was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

United States v. Grom, 21 M.J. 53, 57 (C.M.A. 1985) (quoting *Barker*, 407 U.S. at 532).

The military judge stated that "[n]one of [SSgt Pulley's] conditions were oppressive." App. Ex. XLVI at 3. The Air Force Court went further, saying that pre-trial confinement is never, itself, oppressive. Appendix A at 13. But, in this way, the Air Force Court misapprehended the law. The Supreme Court has made clear that it is the *confinement itself* which is inherently oppressive. *Barker*, 407 U.S. at 532-33 ("The time spent in jail awaiting trial has detrimental impact on the individual."); *see Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) ("Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual."). This is especially so when an accused—who has not even

had charges brought against them—is forced to suffer nearly 300 days of confinement.

Moreover, as discussed in the fourth assigned error, *infra*, SSgt Pulley suffered prejudice from their pretrial confinement in that they were denied adequate medical care. Specifically, SSgt Pulley—who has gender dysphoria—was denied treatment because of their pre-trial confinement status. This denial of treatment exasperated SSgt Pulley's clinically significant distress, including depression and anxiety. Appendix A at 8, 26-28. Moreover, SSgt Pulley testified to this lack of medical care at trial, R. at 201-02.

Further, SSgt Pulley was hindered in their ability to assist in their defense. This is "the most serious" prejudice "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532. SSgt Pulley testified about how pre-trial confinement hindered their ability to prepare for trial. R. at 198-99. Specifically, SSgt Pulley averred that they were unable to review all of the discovery in their case and had difficulty contacting and meeting with their trial defense attorneys. R. at 198-99. The Air Force Court boldly claimed that SSgt Pulley's inability to review evidence was not a result of pre-trial confinement but limitations of SSgt Pulley's trial defense counsel. Appendix A at 14. The Air Force Court provides no citation for this proposition, and neither the Government nor SSgt Pulley raised any such facts to the Air Force Court.

Not only was SSgt Pulley able to present evidence of this "most serious" prejudice at trial, the Supreme Court has recognized that a trial record may not always demonstrate evidence inherent to this prejudice. The Court warned there "is also prejudice if defense witnesses are unable to recall accurately events of the distant pass. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532. Both the military judge and Air Force Court dismissed these concerns. App. Ex. XLVI at 3; Appendix A at 13-14.

The Air Force Court's decision conflicts with binding precedent from this Court and the Supreme Court. Therefore, this Court should grant review to correct this error. C.A.A.F. R. 21(b)(5)(B).

II. SSgt Pulley's conviction for indecent conduct violates the First Amendment because the Government could not prove the speech was obscene. The Air Force Court disagreed, failing to accurately apply the Supreme Court's precedent in *Miller* and this Court's precedent in *Wilcox*.

A. Additional Facts

The Government charged SSgt Pulley with committing indecent conduct for sending a video to SA DA. Charge Sheet. That video showed RP—SSgt Pulley's daughter—sucking on SSgt Pulley's toe. App. Ex. LXII at 2. Accompanying this video was a message stating that RP "out of the blue sucked on my toe like a pro." App. Ex. LXII at 2. SSgt Pulley sent the image and accompanying message to SA DA, an undercover HSI agent, in a "private chat." App. Ex. LXII at 2.

SSgt Pulley moved to dismiss this specification under the First Amendment,[6] arguing that the allegedly proscribed conduct was protected speech. App. Ex. XIX. The military judge denied that motion. App. Ex. XLV. During closing argument, trial defense counsel argued at length that the allegedly indecent conduct should be afforded constitutional protection under the First Amendment. R. at 636-42. The Government responded by arguing that the military judge could not consider "the facts of all of these cases that the defense cited. . . . [or] what is protected speech." R. at 644. The military judge made no special findings with regard to the application of the First Amendment to the subject speech, the obscenity doctrine, the *Miller*[7] factors, or any other applicable caselaw.

B. Standard of Review

Questions of constitutional law are reviewed de novo. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (citation omitted).

C. Law and Analysis

There are several reasons to grant review of this error. First, the Air Force Court relied on *United States v. Meakin*, 78 M.J. 396 (C.A.A.F. 2019), to hold the speech at issue was "obscene." But *Meakin* was wrongly decided because it relied on abrogated Supreme Court precedent. This Court should grant review to redress

[6] U.S. CONST. amend I
[7] *Miller v. California*, 413 U.S. 15, 24 (1973).

this error. C.A.A.F. R. 21(b)(5)(B). Second, the Air Force Court shifted the burden to SSgt Pulley to prove that his conviction was unconstitutional under *Miller*. This burden shift conflicts with clearly established precedent. C.A.A.F. R. 21(b)(5)(B). And third, the Air Force Court misapplied this Court's precedent in *Smith*,[8] *Grijalva*,[9] and *Wilcox*.[10] This Court should grant review to clarify its First Amendment jurisprudence and ensure the lower courts are following this Court's guidance. C.A.A.F. R. 21(b)(5)(A)-(B).

1. *Meakin* relied on abrogated Supreme Court precedent. This Court should grant review to clarify *Meakin*.

The Air Force Court relied on *Meakin* to affirm SSgt Pulley's conviction. Appendix A at 24 ("The CAAF 'has long held that "indecent" is synonymous with "obscene."'" (quoting *Meakin*, 78 M.J. at 401)). But *Meakin* was wrongly decided because it was based on abrogated Supreme Court precedent.

Meakin relied on *United States v. Moore*, 38 M.J. 490 (C.A.A.F. 1994), concluding that "indecent" and "obscene" are the same. *Meakin*, 78 M.J. at 401. The *Moore* Court relied on *United States v. French*, 31 M.J. 57 (C.M.A. 1990), for this same conclusion. *Moore*, 38 M.J. at 492. But the *French* Court erroneously incorporated an outdated, abrogated obscenity standard when it first held that

[8] __ M.J. __, 2024 CAAF LEXIS 759 (C.A.A.F. 2024)
[9] 84 M.J. 433 (C.A.A.F. 2024).
[10] 66 M.J. 442 (C.A.A.F. 2008).

"indecent" is the same as "obscenity." This is because the *French* Court relied on *Roth v. United States*, 354 U.S. 476 (1957), rather than *Miller*.[11] *See French*, 31 M.J. at 59.

Miller, decided nearly two decades after *Roth*, defines the scope of obscenity. *Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (citing *Miller*, not *Roth*, when discussing the unprotected category of obscenity); Obscene, BLACK'S LAW DICTIONARY (11th ed.) (citing *Miller*, 413 U.S. 15); *cf. Counterman*, 600 U.S. at 110 (Thomas, J., dissenting) (stating that while *Roth* created the unprotected category of obscenity, the *Miller* definition controls). This Court's reliance on *French*—and, ultimately, *Roth* and the C.J.S.—conflicts with clearly established precedent of the Supreme Court.

This precedential issue has striking similarities to *Smith*, __ M.J. __, 2024 CAAF LEXIS 759. In that case, the Government argued that A1C Smith's words were "dangerous speech." *Id*. at *14. While this Court's predecessor had adopted the dangerous speech doctrine, *United States v. Howe*, 17 C.M.A. 165, 172 (C.M.A. 1967), that doctrine was later abrogated by the Supreme Court. *Smith*, __ M.J. __, 2024 CAAF LEXIS 759, at * 13-14 (citing *Brandenburg v. Ohio*, 395 U.S. 447 (1969)). Despite this abrogation, military courts continued to use the dangerous

[11] The French Court also cites the 1936 version of the corpus juris secundum (C.J.S.) for its erroneous proposition. *French*, 31 M.J. at 59. This version of the C.J.S. predates *Miller* by nearly 40 years.

speech doctrine for decades. *See*, *e.g.*, *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996); *United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972). In *Smith*, this Court ultimately held that the dangerous speech doctrine was inapplicable because the Supreme Court had re-defined that category of unprotected speech. *Smith*, __ M.J. __, 2024 CAAF LEXIS 759, at *14. Similar to this Court's dangerous speech cases, *Meakin* relies on outdated, abrogated free speech precedent. This Court should grant review to resolve *Meakin*'s inconsistency with *Miller*.

Meakin was wrong in another way, too. In *Meakin*, this Court reasoned that a purely private conversation between consenting adults could be regulated as obscenity. 78 M.J. at 402. But the Supreme Court has never gone so far to say that purely private speech between consenting adults can be regulated as obscene. In fact, in every case where a speech restriction has been upheld as constitutional by the Supreme Court under the obscenity doctrine, the subject speech was of a non-private nature. *Cf. Reno v. ACLU*, 521 U.S. 844, 897-98 (1997) (O'Connor, J., dissenting) (explaining that obscenity restrictions implicate the First Amendment when they regulate speech between consenting adults).

For example, in *Miller*, the appellant "conducted a mass mailing campaign to advertise the sale of . . . 'adult' material." *Miller*, 413 U.S. at 16. This "mass mailing" was, in many cases, unsolicited. *Id.* at 16-17. In *FCC v. Pacifica Found.*, the appellant aired George Carlin's infamous "12-minute monologue entitled 'Filthy

Words'" at 1400 on a Tuesday afternoon over public airways. 438 U.S. 726, 729 (1978). In *Ginsberg v. New York*, the appellant operated a public lunch counter selling, among other things, sexually explicit material to the public. 390 U.S. 629, 631 (1968). And, in *Renton v. Playtime Theaters*, appellants owned movie theaters that intended to publicly broadcast "feature-length adult films." 475 U.S. 41, 44-45 (1986). As far as undersigned counsel is aware, the Supreme Court has never upheld a purely private speech restriction between adults under the obscenity doctrine.

The implications of *Meakin*'s holding—that purely private speech between consenting adults may be regulated as obscenity—are immense. Take, for example, a married couple who consensually exchange pornographic videos and images on a messaging application. Pornographic videos and images are obscene, and their non-consensual dissemination or public broadcast to others may be regulated. But, under this Court's current jurisprudence, the Government could prosecute and convict the couple for indecent communication for this purely private speech. That couple would have no constitutional claim against such a prosecution.

Because *Meakin* was wrongly decided, this Court should grant review to bring *Meakin* in line with clear Supreme Court precedent.

2. The Air Force Court placed the burden on SSgt Pulley to prove his conviction was unconstitutional. This was an erroneous burden shift in clear conflict of established precedent.

The Air Force Court held that SSgt Pulley "fail[ed] to explain why their

conduct was not obscene." Appendix A at 25. This burden shift conflicts with clearly established precedent.

When there is no forfeiture, appellate courts review constitutional questions de novo. *Smith*, __ M.J. __, 2024 CAAF LEXIS 759, at *7. And, the burden is on the Government to prove beyond a reasonable doubt every fact of the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). This includes proving that the crime charged is constitutional as applied. *Cf. United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (placing responsibility on the Government to prove the constitutionality of a speech restriction).

Despite being under a de novo review, the Air Force Court put the onus on SSgt Pulley to prove his conviction was constitutional. The Air Force Court may have been confused because the Government declined to argue that SSgt Pulley's speech fell within the unprotected category of obscenity pursuant to *Miller*. Nevertheless, the Air Force Court erred by reasoning SSgt Pulley had to prove their speech was constitutionally protected, a burden that falls squarely with the Government. Therefore, this Court should grant review.

3. The Air Force Court misapprehended this Court's free speech jurisprudence. This Court should grant review to correct this error and clarify the *Wilcox* test.

The Air Force Court "easily resolve[d]" SSgt Pulley's argument that *Wilcox* requires reversal. Appendix A at 25. The Air Force Court "discern[ed] a direct and palpable connection to the military environment" because (1) SSgt Pulley's daughter

was a military dependent, and (2) the indecent communication was ostensibly made on base. Appendix A at 25. These facts are insufficient to meet the *Wilcox* requirement.

In *United States v. Grijalva*, this Court re-affirmed that *Wilcox* requires the Government prove a direct and palpable connection to the military mission or environment for First Amendment cases. 84 M.J. at 438. In *Wilcox*, the appellant identified himself online as an Army paratrooper. 66 M.J. at 450. While using that Army profile, the appellant stated he was a "Pro-White activist doing what I can to promote the ideals of a healthier environment" and that "[we] must secure the existence of our people and a future for white children." *Id*. at 445 (alteration in original). The appellant also had several conversations with an undercover agent online, again identifying himself as an Army member. *Id.* at 445-46. This Court held that there was no evidence of a direct and palpable connection to the military environment or mission because the speech was not directed at servicemembers. *Id.* at 450.

The cases preceding *Wilcox* are also instructive. *See id.* at 449 (discussing the origins of the "direct and palpable" factor). For instance, in *Priest*, the appellant published a newsletter calling for desertion from the military, as well as violent revolution against the United States, during the Vietnam War. *Priest,* 45 C.M.R. at 342. In *Brown*, 45 M.J. 389, this Court reviewed the appellant's conviction for

conspiring to organize a strike during the Gulf War. *Id.* at 392. This Court held that the appellant's actions—which included organizing a strike to promote better living conditions in a combat zone—jeopardized the orderly accomplishment of the war fighting mission. *Id.* at 392-93, 395. This Court concluded that, in those cases, "the speech was directed to servicemembers" and therefore had a direct and palpable impact on the military mission. *Wilcox*, 66 M.J. at 450.

The Air Force Court relied on several facts in this case that purportedly show a direct and palpable connection, but none of those facts are sufficient. First, the Air Force Court reasoned that the subject of the indecent communication was Appellant's daughter (a military dependent). Appendix A at 25. But, just because speech involves military dependents or military members, does not mean there is a direct and palpable connection.

Second, the Air Force Court relied on the fact that the recording was ostensibly made on a military installation. There are two problems with this evidence. At the outset, SSgt Pulley was not charged with or convicted of making an indecent video; he was convicted of indecent communication. While the video may have been made on base, neither the Government nor the Air Force Court point to any evidence that the indecent communication occurred on base. Moreover, even if the communication occurred on base, it was not directed at servicemembers, like in *Priest* and *Brown*. Instead, it was directed at a civilian law enforcement agent

who, like the agent in *Wilcox*, believed the subject was a military member.

The Government presented no evidence of a direct and palpable connection. The Air Force Court's reliance on cursory military connections is insufficient to meet this *Wilcox* factor. Therefore, this Court should grant review to correct this error and clarify the type of evidence necessary to satisfy *Wilcox*.

III. As applied to SSgt Pulley, 18 U.S.C. § 922 is unconstitutional.

A. *Additional Facts*

After their conviction, the Government determined SSgt Pulley qualified for firearms prohibition under 18 U.S.C. § 922 by marking "Yes" on the category "Firearm Prohibition Triggered," located on the Staff Judge Advocate's indorsement to the Entry of Judgement (EOJ). 1st Ind., EOJ. SSgt Pulley challenged the prohibition at the Air Force Court. Appendix A at 1-2. The Air Force Court denied relief, purportedly for lack of jurisdiction. Appendix A at 1-2.

B. Standard of Review

The constitutionality of an act of Congress is a question of law reviewed de novo. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). For an "as applied" constitutional challenge, this Court conducts a fact-specific inquiry. *Id*. (citations omitted).

This Court reviews questions of jurisdiction de novo. *United States v. Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *7 (C.A.A.F. 2024). Questions of

statutory construction are also reviewed de novo. *See id*. (reviewing whether the lower court acted outside its Article 66, UCMJ, 10 U.S.C. § 866, authority de novo); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

C. Law and Analysis

This Court should grant review of this case as a trailer to *United States v. Johnson*, which is considering the same firearm prohibition issue. Order Granting Review, *United States v. Johnson*, No. 24-0004/SF, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024). SSgt Pulley's case involves all the same questions, which remain unresolved by the Air Force Court and this Court after *Williams*, __ M.J. __, 2024 CAAF LEXIS 501.

The Air Force Court had jurisdiction[12] to consider the post-trial processing error under Article 66(d)(2), UCMJ, which provides that the Air Force Court "may provide appropriate relief if the accused demonstrates error . . . in the processing of the court-martial after the judgment was entered into the record." Raising and correcting the firearm prohibition error is possible because of the timing and presence of the 18 U.S.C. § 922 prohibition in the EOJ. Unlike the Army, the Air Force completes its final 18 U.S.C. § 922 indexing after the EOJ, which it then

[12] Jurisdiction to review a case has two separate but related parts: first, whether there is jurisdiction over the case, and second, whether there is authority to act. *Williams*, __M.J.__, 2024 CAAF LEXIS 501, at *8. The jurisdictional question here concerning the Air Force Court is focused on the authority to act.

incorporates into the judgment itself. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶¶ 20.41, 29.32, 29.33 (Apr. 14, 2022) (Appendix B). As a result, SSgt Pulley's case is factually distinct from *Williams*. *Cf. Williams*, 2024 CAAF LEXIS 501, at *13-15 (discussing how the Army's firearm prohibition indexing precedes the EOJ because it is only in the Statement of Trial Results (STR)). Because the firearm prohibition occurs after the EOJ, the Air Force Court had the authority to act and provide appropriate relief for the error SSgt Pulley raised.

However, the Air Force Court denied any relief because it seemed to determine it did not have jurisdiction, citing case law founded in Article 66(d)(1), UCMJ. Appendix A at 2-3 (citing *United States v. Vanzant*, 84 M.J. 671, 680-81 (A.F. Ct. Crim. App. 2024)). The Air Force Court's determination that there was no jurisdiction to review the application of 18 U.S.C. § 922 to SSgt Pulley's case conflicts with this Court's decision in *Williams. Williams*, __M.J.__, 2024 CAAF LEXIS 501, at *14; C.A.A.F. R. 21(b)(5)(B)(i). This Court should grant review to clarify the Air Force Court's authority to act under Article 66(d)(2), UCMJ.

Furthermore, because the Air Force Court denied relief on whether 18 U.S.C. § 922 was constitutionally applied to SSgt Pulley, this Court has jurisdiction to review and act upon the firearm prohibition in the EOJ. Article 67(c)(1)(B), UCMJ, 10 U.S.C. § 867(c)(1)(B). This is because the first indorsement containing the

firearm prohibition is part of the military judge's judgment (the EOJ) as required by statute, the R.C.M.s, and regulation. Article 60c, UCMJ, 10 U.S.C.§ 860c; R.C.M. 1111(b)(3)(F); DAFI 51-201, at ¶¶ 20.41, 29.32. And by denying relief, the Air Force Court "affirmed" the judgment. Article 67(c)(1)(B), UCMJ, 10 U.S.C. § 867(c)(1)(B).

As this Court determined in *Williams*, this Court can act on the STR in the EOJ. *Williams*, __M.J.__, 2024 CAAF LEXIS 501, at *10. Like the STR, the firearm prohibition in the indorsement is a required part of the EOJ. *Id*. (citing Article 60c(a)(1)(A), UCMJ, 10 U.S.C. §60c(a)(1)(A)); DAFI 51-201, at ¶ 20.41. Like the STR in *Williams*, the indorsement here is in the judgment, which this Court can act upon under Article 67(c)(1)(B), UCMJ. Because this Court independently has jurisdiction and authority to act, this Court should grant review because the Government's indexing violates the Second Amendment. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022); C.A.A.F. R. 21(b)(5)(B)(ii).

Specifically, the Government has not demonstrated that permanently barring SSgt Pulley from owning a firearm is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The historical tradition took a narrow view of firearm regulation for criminal acts than that reflected in 18 U.S.C. § 922:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the

> Second Amendment to the extent that . . . its basis credibly indicates a present *danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701. A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, larceny, burglary, and housebreaking." *Id.* at 701 (cleaned up). SSgt Pulley's offense falls short of these.

The Supreme Court recently addressed the validity of 18 U.S.C. § 922(g)(8)(C)(i), which applies once a court finds a defendant "represents a credible threat to the physical safety" of another and issues a restraining order. *United States v. Rahimi*, 602 U.S. 680, 688 (2024). The Supreme Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id*. at 698.

But the historical analogue breaks down when applied here. In *Rahimi*, the Supreme Court noted that the "surety" and "going armed laws" supporting a

restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 699. The Supreme Court also noted that surety bonds were of limited duration, similar to how 18 U.S.C. § 922(g)(8) only applies while a restraining order is in place. *Id*. Additionally, the majority pointed out that 18 U.S.C. § 922(g)(8) "involved judicial determinations," comparable to the historical surety laws' "significant procedural protections." *Id*. at 696, 699.

By contrast, this case never involved a threat with a weapon, was devoid of any procedural protection at the time the firearm prohibition was imposed, and the firearm prohibition under 18 U.S.C. § 922(g)(1) (the only possible applicable category) will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding: "[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 602 U.S. at 702. Such a narrow holding cannot support the broad restriction encompassed here. This Court should grant review so it can correct this error of constitutional magnitude. C.A.A.F. R. 21(b)(5)(A).

IV. The Government violated SSgt Pulley's right against cruel and unusual punishment by failing to provide gender affirming medical care despite repeated requests.

A. Standard of Review

Military courts may "determine on direct appeal if the adjudged or approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55." *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). This is because, "unlike civilians, military prisoners have no civil remedy for alleged constitutional violations." *Id*. The question of whether the "facts alleged constitute cruel and unusual punishment" or constitute a violation of Article 55, UCMJ, is reviewed de novo. *United States v. Pullings*, 83 M.J. 205, 211 (C.A.A.F. 2023); *White*, 54 M.J. at 471.

B. Additional Facts

Prior to their pre-trial confinement, SSgt Pulley was diagnosed with gender dysphoria.[13] App. Ex. IV at 2; *cf.* Appendix A at 6. The Government was aware of

[13] Before pre-trial confinement, SSgt Pulley was receiving consistent mental health care related to their gender dysphoria. R. at 207-08. Despite this, SSgt Pulley avoided receiving an official diagnosis due to President Donald Trump's policies concerning transgender individuals in the miliary. R. at 208. After the change in those policies under President Joe Biden—which corresponded in time with SSgt Pulley's pre-trial confinement—SSgt Pulley received their official diagnosis for gender dysphoria. R. at 208. This diagnosis has been confirmed numerous times, to include while in confinement. Appendix A at 1.

this diagnosis as early as July 8, 2021, the same day SSgt Pulley was ordered into pre-trial confinement. App. Ex. IV at 2.

After being diagnosed with gender dysphoria, SSgt Pulley began receiving treatment. *Cf.* R. at 201 (informing that treatment stopped after being placed in pre-trial confinement). Typical treatment for gender dysphoria includes hormone therapy as well as cognitive and behavioral therapy. *See, e.g.*, Appendix A at 26, 28, 31. Treatment may also include permitting the patient to live as their preferred gender (i.e., introducing themselves as, and dressing in accordance with, their preferred gender). R. at 201-02.

After being ordered into pre-trial confinement, SSgt Pulley requested continued treatment for their gender dysphoria. Appendix A at 26-28. However, SSgt Pulley was denied that treatment for all 448 days of their pre-trial confinement because they were in a pre-trial confinement status. Appendix A at 8; *cf.* Appendix A at 26-28. After their conviction, SSgt Pulley was moved from pre-trial confinement at Malmstrom Air Force Base to Navy Consolidated Brig Charleston (Charleston). Appendix A at 26. Upon arrival at Charleston, SSgt Pulley again requested treatment for their gender dysphoria. Appendix C at 26-28. While Charleston noted the request, SSgt Pulley never received treatment. Appendix A at 26-29.

SSgt Pulley made repeated requests to receive gender dysphoria treatment while in confinement. Appendix A at 26. Despite their repeated requests, SSgt Pulley received no treatment for their gender dysphoria for the three years they spent in confinement. Appendix A at 26-29. Moreover, SSgt Pulley filed an Article 138, UCMJ, complaint to their commander requesting immediate treatment for gender dysphoria. Appendix A at 26. Despite this complaint, no treatment was ever provided.

In total—despite their repeated diagnoses and requests for treatment—SSgt Pulley was denied any treatment for their condition for three years. While the Government provided affidavits from prison officials that averred they did not purposefully deny SSgt Pulley medical care, the Government provided no evidence that SSgt Pulley actually received the requested care. Appendix A at 31-32.

C. Law and Analysis

This Court should grant review for three reasons. First, this Court can clarify the extent to which a transgender confinee—who seeks gender-affirming healthcare—is protected by the Eighth Amendment. C.A.A.F. R. 21(b)(5)(A). This question has divided the federal circuits and there is no clear answer in the military. Second, the Air Force Court erred by finding that prison officials had neither a culpable state of mind nor indifference to SSgt Pulley's medical needs. C.A.A.F. R. 21(b)(5)(B). Third, the Air Force Court reasoned that an appellant must prove they

"suffered, or was put at risk of suffering, serious harm" to obtain relief under the Eighth Amendment. Appendix A at 32 (quoting *United States v. Pullings*, 83 M.J. 205, 213-14 (C.A.A.F. 2023)). The *Pullings* standard is in conflict with the Supreme Court's Eighth Amendment[14] jurisprudence. C.A.A.F. R. 21(b)(5)(B). This Court should grant review to clarify that standard.

1. This Court should grant review to define the scope of protection afforded transgender confinees under the Eighth Amendment, heretofore undefined in military courts.

Treatment for gender dysphoria is a serious medical need under the Eighth Amendment. The federal circuits have unanimously concluded that complete denial of treatment constitutes an Eighth Amendment violation. *Edmo v. Corizon*, *Inc*., 935 F.3d 757, 793-94, 803 (9th Cir. 2019) (holding that a prison's failure to provide gender conforming surgery violated a prisoner's Eighth Amendment rights); *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (holding that state legislation banning the provision of hormone therapy to prisoners violated the Eighth Amendment); *cf. Gibson v. Collier*, 920 F.3d 212, 224 (5th Cir. 2019) (recognizing no Eighth Amendment violation because the prisoner was provided hormone therapy and counseling); *Kosilek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014) (en banc) (holding that providing medical treatment for gender dysphoria—such as hormone therapy—satisfies some Eighth Amendment concerns); *Kothmann v. Rosario*, 558 Fed. Appx.

[14] U.S. CONST. amend VIII.

907, 912 (11th Cir. 2014) (holding that a prisoner's Eighth Amendment claim could go forward when the prisoner was denied access to hormone therapy).

While the federal circuit courts have unanimously held that complete denial of gender dysphoria treatment violates the Eighth Amendment, there is disagreement about the scope of the treatment which must be provided. For example, some circuits have gone so far as to suggest that gender reassignment surgery may be necessary to avoid claims of cruel and unusual punishment. *See*, *e.g.*, *Edmo*, 935 F.3d at 803. Other circuits disagree, preferring a more limited approach. *Gibson*, 920 F.3d at 224 (reasoning that sex reassignment surgery may not be required by the Eighth Amendment).

Despite this growing area of judicial discourse, neither the Supreme Court nor any military court has provided guidance on: (1) whether gender dysphoria is a serious medical need, and (2) the scope, if any, of the care required to satisfy that need. Notably, even in this case, the Air Force Court declined to hold whether gender dysphoria is a serious medical need under the Eighth Amendment and the scope of any such care, despite SSgt Pulley asking the court to do so. This case provides this Court an avenue to address this important and evolving area of constitutional law that impacts vulnerable members of the Armed Forces across the services. Therefore, this Court should grant review. C.A.A.F. R. 21(b)(5)(A).

2. This Court should grant review to correct the Air Force Court's error in determining that prison officials were not indifferent to SSgt Pulley's medical needs because it conflicts with clearly established precedent from this Court and the Supreme Court.

The Air Force Court concluded that SSgt Pulley failed to prove that prison officials were deliberately indifferent to their medical needs. Appendix A at 32. But this conclusion flies in the face of available evidence and binding precedent from the Supreme Court. C.A.A.F. R. 21(b)(5)(B).

The Air Force Court primarily relies on the fact that prison officials took steps toward getting SSgt Pulley treatment, even though SSgt Pulley never actually received medical care. Appendix A at 32. The Supreme Court's jurisprudence is clear: "deliberate indifference to serious medical needs" is all that is necessary to demonstrate an Eighth Amendment violation; steps are insufficient. *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) ("Deliberate indifference to serious medical needs of prisoners. . . [is] proscribed by the Eighth Amendment [and includes] indifference . . . manifested by prison doctors . . . or by prison guards in . . . delaying access to medical care."). It does not matter that confinement officials took *some* steps to obtain care if the care was not provided. And, while leeway may be afforded to confinement officials facing novel issues, gender dysphoria is not novel in the prison system. *See, e.g.*, Fields, 653 F.3d at 559 (adjudicating state legislation about gender dysphoria treatment for confinees 13 years ago).

Therefore, this Court should grant review to correct this error and clarify

guidance on the level of culpability a prison official need have for an Eighth Amendment violation. C.A.A.F. R. 21(b)(5)(A)-(B).

3. This Court should grant review to clarify the standard articulated in *Pullings* as it conflicts with Supreme Court precedent.

In *Pullings*, this Court held that appellants must show they suffered serious harm, or were put at risk of serious harm, to prove an Eighth Amendment violation. However, the Supreme Court has never held that the showing of a "serious harm" is necessary to prevail for a medical Eighth Amendment claim. *See*, *e.g.*, *Erickson*, 551 at 90; *Nelson v. Campbell*, 541 U.S. 637, 645 (2004); *Deshaney v. Winnebago County Dep't of Social Serv's*, 489 U.S. 189, 198 n.5 (1989). Rather, the prisoner need only demonstrate deliberate indifference to a "serious" medical need. *Compare Estelle*, 429 U.S. at 105 (establishing the medical standard of deliberate indifference to a serious medical need), *with Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (explaining the standard for non-medical Eighth Amendment claims, including the creation of conditions which pose a substantial risk of "serious harm.").

The Air Force Court relied on this Court's reasoning in *Pullings* to deny SSgt Pulley's Eighth Amendment claim. Appendix A at 32. But *Pullings* is in conflict the Supreme Court's Eighth Amendment jurisprudence. Therefore, this Court should grant review to clarify *Pullings* in light of Supreme Court precedent. C.A.A.F. R. 21(b)(5)(B).

CONCLUSION

This case is an excellent vehicle for this Court to answer the errors assigned. The deficiencies in the Air Force Court's decision arise from preserved errors and raise important questions. These questions underscore widely applicable tensions with this Court's decisions and between this Court's cases and Supreme Court precedent. To harmonize these issues and afford clarity to practitioners and lower courts, this Court should grant review.

Respectfully submitted,

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Certificate of Compliance with Rules 21 and 37

Pursuant to Rule 24(d), this Supplement to the Petition for Grant of Review complies with the type-volume limitation of Rule 21(b) because it contains 8,942 words and complies with the typeface and type style requirements of Rule 37(a) because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Certificate of Filing and Service

I certify that an electronic copy of the forgoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on January 15, 2025.

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Appendix A (Air Force Court Opinion)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40438 (f rev)

UNITED STATES
Appellee

v.

Mark A. PULLEY
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Upon Further Review

Decided 24 October 2024

Military Judge: Matthew P. Stoffel (motions); Brian C. Mason.

Sentence: Sentence adjudged 28 September 2022 by GCM convened at Malmstrom Air Force Base, Montana. Sentence entered by military judge on 16 November 2022: Dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Jenna M. Arroyo, USAF; Captain Trevor N. Ward, USAF.

For Appellee: Lieutenant Colonel J. Peter Ferrell, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, ANNEXSTAD, and WARREN, *Appellate Military Judges*.

Senior Judge RICHARDSON delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge WARREN joined.

RICHARDSON, Senior Judge:

In accordance with Appellant's pleas, a general court-martial comprised of a military judge sitting alone convicted Appellant of one specification of possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, and one specification of attempted distribution of child pornography, in violation of Article 80, UCMJ, 10 U.S.C. § 880.[1,2] Contrary to their[3] pleas, Appellant was convicted of one specification of indecent conduct, in violation of Article 134, UCMJ.[4] The court-martial sentenced Appellant to a dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took no action on the findings. The convening authority deferred the reduction in grade and forfeitures until the entry of judgment, suspended six months of the adjudged forfeitures, and waived the resulting automatic forfeitures for six months for the benefit of Appellant's spouse and two children.

Appellant raises five issues on appeal: (1) whether the Government's delay in investigating and prosecuting this case violated Appellant's constitutional and statutory rights to a speedy trial; (2) whether the terminal element of Article 134, UCMJ, Clause 2, and applicable caselaw create a conclusive presumption, rendering Appellant's conviction under that article unconstitutional; (3) whether Appellant's conviction for indecent conduct violates the First Amendment;[5] (4) whether denying Appellant gender-affirming healthcare violated their Eighth Amendment[6] right against cruel and unusual punishment; and (5) whether the Government can prove the 18 U.S.C. § 922 firearms prohibition is constitutional as applied to Appellant. We have carefully considered issue (5) and conclude it warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *see also United*

---

[1] Unless otherwise specified, all references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant's pleas were by exceptions and substitutions. The Government attempted to prove up the excepted language in the specification alleging attempted distribution of child pornography (Specification of Charge II), but was unsuccessful.

[3] Appellant's brief notes that "they, them" currently are Appellant's preferred pronouns. We have attempted to honor that preference in our writing, but generally have not altered quoted language.

[4] In accordance with their plea, Appellant was found not guilty of a second specification of indecent conduct in violation of Article 134, UCMJ.

[5] U.S. CONST. amend. I.

[6] U.S. CONST. amend. VIII.

States v. Vanzant, 84 M.J. 671, 680–81 (A.F. Ct. Crim. App. 2024) (holding the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review); *cf. United States v. Williams*, __ M.J. __, No. 24-0015, 2024 CAAF LEXIS 501, at *12–13 (C.A.A.F. 5 Sep. 2024) (finding Courts of Criminal Appeals lack authority to modify information in the trial Statement of Results that is "not part of the findings or sentence"). As to the remaining assignments of error, we find no error that materially prejudiced Appellant's substantial rights.

I. BACKGROUND

In May 2021, Special Agent (SA) DA with Homeland Security Investigations (HSI) posed in an online chat room as a 33-year-old father of an 8-year-old daughter. Upon entry into this particular chat room, the user was instructed to state their name, their age, their daughter's age, and whether they are "active," meaning sexually active with their daughter. Appellant entered the chat room and, using a pseudonym, indicated, "30, 5, not active." SA DA initiated a conversation with Appellant in the chat room. On 17 May 2021, Appellant sent SA DA a video that SA DA described as "a prepubescent female sucking on the toe of an adult male." Appellant accompanied the video with the statement that she "out of the blue sucked on my toe like a pro last night."

Appellant also sent SA DA three videos of a woman (AO) who Appellant thought was younger than 18 years. In one of the videos, AO removes her underwear and exposes her pubic region as she lay on a bed.

Based on the tenor of their conversation, and the videos Appellant sent him, SA DA sent a summons to the chat room host for "basic subscriber data and IP address information." The resulting information led to Appellant. After learning of Appellant's Air Force connection, HSI referred the matter to the Air Force Office of Special Investigations (OSI) in early July 2021. OSI learned that Appellant was on leave. They obtained a search authorization and waited until Appellant's return to execute it.

Meanwhile, in early June 2021, Appellant and Appellant's wife (RAP), along with their two children, traveled by car to visit Appellant's relatives. During the overnight stop on the two-day drive, RAP checked Appellant's iPad to see if videos for their daughter (RP) to watch during the drive were downloaded. While on the device, RAP looked through the photos to see if Appellant had any baby photos of their children that she did not have. She found photos and a video of their daughter in the "recently deleted" folder. She described the video as "[Appellant] sitting on the couch [in their home] opposite of [RP] and he was repeatedly sticking his big toe into her mouth." She saw the date of the photos and video was 17 May 2021; RP was 5 years old. A version of this video,

altered to add glasses over RP's face, was the video SA DA received from Appellant in the chat room.

Upon the family's return to Malmstrom Air Force Base (AFB) on 8 July 2021, the search authorization was executed and Appellant was placed in pretrial confinement. Agents seized around 25 pieces of evidence, mostly digital media. OSI agents interviewed RAP, who described finding the "very disturbing" photos and video on Appellant's iPad during their trip.

An analysis of Appellant's digital media revealed he possessed child pornography. Appellant pleaded guilty to possessing one video showing an adult woman sexually abusing a girl.

II. DISCUSSION

A. Speedy Trial

Appellant asserts denial of their speedy trial rights under the Sixth Amendment[7] and Article 10, UCMJ, 10 U.S.C. § 810. At trial, however, Appellant waived their right to relief for this Sixth Amendment claim. "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The Sixth Amendment right to a speedy trial may be waived. *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005). In his ruling the military judge noted: "The [d]efense motion on this issue referenced all three sources [(Rule for Courts-Martial (R.C.M.) 707, Article 10, UCMJ, and Sixth Amendment)] as the basis for the motion relief requested. At the motions hearing, [d]efense [c]ounsel made clear that the sole basis for their request for relief was Article 10[, UCMJ]." This conclusion that Appellant abandoned their Sixth Amendment claim was not challenged and is supported by the record. Therefore, we consider only Appellant's speedy trial claim rooted in Article 10, UCMJ.

1. Additional Background

Appellant was placed in pretrial confinement on 8 July 2021 and remained in pretrial confinement until they were sentenced on 28 September 2022.

On 22 July 2021, Appellant first demanded a speedy trial. Appellant also demanded a speedy trial on 20 October 2021, 9 December 2021, 23 February 2022, 21 March 2022, and 24 May 2022. Between 3 August 2021 and 26 January 2022, the Government made four requests to the special court-martial

[7] U.S. CONST. amend. VI.

convening authority to exclude time pursuant to R.C.M. 707, each time providing a description of the progress of the investigation.

The same day Appellant was confined, on 8 July 2021 OSI agents executed a search authorization and seized 24 items of digital media. OSI worked with a state of Montana lab to extract data from two of the seized devices. On 27 July 2021, OSI sent the seized digital evidence to the Department of Defense Cyber Crime Center's Cyber Forensics Laboratory (DC3/CFL) to extract the data. Beginning around 6 August 2021, DC3/CFL began its process. After encountering mechanical issues, it completed most of the extractions and provided OSI a "findings" report on 6 October 2021.

The findings report included a "results drive" or "findings drive" containing hundreds of thousands of files. SA JC testified during a motion hearing[8]

> The report from DC3 contained, I believe, over 900,000 files. I believe there were 270 or so thousand images, several thousand videos. I reviewed all of those. I flagged around 1,400 or so images, which I suspected were child pornography, and I believe there were six videos that I flagged as child pornography. And there were also multiple web-related files, like search queries, search terms, that, I believe, were pertinent to a child porn investigation.

In late October 2021, OSI acquired and submitted warrants on nine software companies, and received responses in early November 2021. The chronology in the Government's answer to Appellant's brief lists no activity between 14 November 2021 and 4 January 2022. However, in a 13 December 2021 request to the convening authority to exclude time, the Government stated it had identified an expert in pediatrics to view the images and opine on the age of the persons depicted. It anticipated the review would be complete by 15 January 2022. According to its 26 January 2022 exclusion request, the Government learned that the previously identified expert was retiring, and they had identified a different expert, Dr. AH, to complete the review.

In early January 2022, OSI and the base legal office deputy staff judge advocate reviewed items flagged as suspected or possible child exploitation material. OSI narrowed the flagged items to 24,[9] and sent the formal request to

---

[8] SA JC testified during the hearing relating to the defense motion to exclude evidence of other misconduct under Mil. R. Evid. 404(b).

[9] At this time, OSI believed DC3/CFL's 24-file limit applied.

DC3/CFL on 25 February 2022 for a "deep-dive" follow-on analysis.[10,11] Also on 25 February 2022, OSI started making arrangements for Dr. AH to conduct a sexual maturity rating review of suspected child pornography. Dr. AH reviewed the materials on 23 March 2022, and provided a report on 31 March 2022.

Also on 31 March 2022, a total of two charges and four specifications were preferred against Appellant. The same day, they were served on Appellant and received on behalf of the special court-martial convening authority. The Government set a date of 12 April 2022 for a preliminary hearing under Article 32, UCMJ, 10 U.S.C. § 832, but had not secured a preliminary hearing officer. Appellant waived the hearing on 8 April 2022. The special court-martial convening authority forwarded the charges and specifications to the general court-martial convening authority, who received them on 29 April 2022. The general court-martial convening authority referred the charges and specifications to a general-court martial on 4 May 2022, the day after his staff judge advocate provided pretrial advice.

In the absence of agreed-upon dates for a pretrial hearing and trial, and upon the Defense's request, the trial judiciary held a docketing conference with the parties on 31 May 2022—the same day the Government sent in its docketing request. The trial judiciary deemed the Prosecution's case-ready date as 6 June 2022, and the Defense's case-ready date as 26 September 2022. It set 29 August 2022 as the date for arraignment and 26 September 2022 as the date for trial.

On 7 June 2022, Appellant's trial defense counsel requested an inquiry under R.C.M. 706 (sanity board). The Prosecution did not oppose. On 9 July 2022, the military judge ordered the sanity board. The summarized report of the sanity board is dated 12 August 2022. The report indicated one of Appellant's diagnoses was gender dysphoria.

On 24 June 2022, DC3/CFL provided OSI a 42-page report following OSI's "deep dive" request from February 2022.[12]

On 27 June 2022, upon the Defense's request, the military judge set an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing on the defense motion to release

---

[10] SA JC testified "it is part of OSI's policy to send flagged items to DC3 for follow-on examination."

[11] SA JC testified he sent additional information to DC3/CFL for follow-on analysis, but those results did not provide additional investigative "leads."

[12] The report indicates DC3/CFL received OSI's request on 23 February 2022. Other evidence in the record suggests OSI sent it on 25 February 2022. We find this discrepancy insignificant.

Appellant from pretrial confinement. The military judge scheduled the hearing for 20 July 2022, but, upon the Defense's later request, continued it to 29 August 2022—the date set for the arraignment.

As part of its investigation into Appellant, OSI worked with New Zealand authorities to obtain from a New Zealand Internet company evidence of Appellant's possession of child pornography. In September 2021, agents requested information from New Zealand on how to access an account Appellant had with a New Zealand provider. In June 2022, OSI coordinated with the Digital Child Exploitation Team, Department of Internal Affairs, New Zealand, regarding Appellant's account, and in early July 2022 received files and reports. From that lead, SA JC received and reviewed over 3,000 files, and flagged about 1,200 photos and videos as child pornography. SA JC explained that the videos and images were more complete versions of the fragments found on Appellant's devices.

On 13 July 2022, OSI officially closed its investigation into Appellant, and disseminated a lengthy report.

Appellant was arraigned on 29 August 2022. During that pretrial hearing, which ended on 30 August 2022, Appellant deferred entry of pleas and selection of forum, and litigated several motions. Among those motions were a motion for release from pretrial confinement and a motion to dismiss for a speedy trial violation.

Appellant testified on the motion to dismiss. Appellant recounted their experiences the day they were placed in pretrial confinement, their first full day of confinement, and an average day in confinement. Trial defense counsel asked Appellant a series of questions about the impact confinement had on them:

> Q. How has your time in pretrial confinement impacted you mentally?
>
> A. I would say that it's impacted it greatly.
>
> Q. Has the time in pretrial confinement increased your anxiety?
>
> A. Yes.
>
> . . . .
>
> Q. [Appellant], how has the time in pretrial affected you emotionally?
>
> A. It has greatly affected me emotionally.
>
> Q. How has it affected you psychologically?
>
> A. Also very greatly impacted that.

> . . . .
>
> Q. If you were not in pretrial confinement, would you . . . be living a more open life as a female?
>
> A. Yes. I would be able to follow the recommendations given to me by my Mental Health providers here on Malmstrom Air Force Base.

Trial defense counsel also asked Appellant a series of questions about Appellant's preparation for trial. Appellant explained they had not reviewed all the "thousands of pages" of documents or "at least over 50" videos or media in discovery because of the unavailability of an escort and vehicle to travel to trial defense counsel's office, and the limited number of computers in that office. On cross-examination, Appellant testified they had access, albeit limited, to defense counsel, and agreed "[n]one of the members of the confinement facility sought to obstruct" that access.

Appellant also testified about gender dysphoria, and their desire to live as a female. After trial defense counsel confirmed Appellant was "aware of a process in the Air Force to allow [them] to have exceptions to live as a female," Appellant stated they had not "been able to complete that process" because of pretrial confinement. Appellant testified not being able to live as a female in pretrial confinement impacted them "a very large amount."

On cross-examination by the special trial counsel, Appellant clarified the timing of their gender dysphoria diagnosis. Appellant testified they had been "undergoing therapy to address issues of gender dysphoria" with a civilian provider and not a miliary provider,[13] but Appellant was not diagnosed with gender dysphoria "until after being placed in pretrial [confinement]." Due to that pretrial confinement, they could not continue to see the civilian provider and "had to start from scratch" with a military-affiliated provider. Appellant also clarified that, before confinement, they had taken few steps to present as female.

Trial began on 26 September 2022; Appellant was sentenced on 28 September 2022.

2. Law

"In the military justice system, an accused's right to a speedy trial flows from various sources, including the Sixth Amendment [and] Article 10 of the

---

[13] Appellant explained when they "first seriously considered treatment" they were "unable to, based on the previous presidential administration's decisions regarding transgender service members." Appellant sought treatment, but "outside of the military Mental Health" out of fear of "being pushed out of the service."

[UCMJ] . . . ." *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003). "Article 10[, UCMJ,] imposes a more stringent speedy trial standard than the Sixth Amendment . . . ." *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (citing *Mizgala*, 61 M.J. at 129) (additional citation omitted).

We conduct a de novo review of speedy trial claims. *United States v. Heppermann*, 82 M.J. 794, 803 (A.F. Ct. Crim. App. 2022) (citation omitted). We give "substantial deference to a military judge's findings of fact that will be reversed only if they are clearly erroneous." *Mizgala*, 61 M.J. at 127 (citing *Cooper*, 58 M.J. at 57–59) (additional citation omitted); *Heppermann*, 82 M.J. at 803. "A finding of fact is clearly erroneous when 'there is no evidence to support the finding' or when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021) (quoting *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018)).

Article 10, UCMJ, provides in pertinent part: "When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken . . . to try the person or to dismiss the charges and release the person." 10 U.S.C. §§ 810(b)(1), 810(b)(1)(B). The speedy trial requirement of "Article 10*,* UCMJ, does not demand constant motion but does impose on the Government the standard of 'reasonable diligence in bringing the charges to trial.'" *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016) (quoting *Mizgala,* 61 M.J. at 129). "Short periods of inactivity are not fatal to an otherwise active prosecution." *Mizgala*, 61 M.J. at 127 (citation omitted). We "look[ ] at the proceeding as a whole and not mere speed." *Id.* at 129 (citation omitted). "A conclusion of unreasonable diligence may arise from a number of different causes and need not rise to the level of gross neglect to support a violation." *Id.* (citation omitted).

> We determine whether the prosecution was reasonably diligent by employing the four-factor test articulated by the [United States] Supreme Court in *Barker v. Wingo*, 407 U.S. 514 . . . (1972): (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.

United States v. Reyes, 80 M.J. 218, 226 (C.A.A.F. 2020) (citing *Cooley,* 75 M.J. at 259). "None of these factors alone are a 'necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.'" *Id.* (quoting *Cooley*, 75 M.J. at 259). "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

"The length of delay is measured under Article 10[, UCMJ,] as it is for the Sixth Amendment: from the date an accused enters pretrial confinement until the commencement of the trial on the merits." *Reyes*, 80 M.J. at 226 (footnote omitted) (citing *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016); *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014)).

When assessing the reason for delay, this court considers the context, because a "delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. Additionally, a delay intended to "hamper the defense" should be weighted more heavily than a "more neutral reason such as negligence." *Id.* (footnote omitted). Where the delay is based on the prosecution's trial strategy, a time-consuming approach is permissible if the strategy is "not unusual or inappropriate" under the circumstances. *Danylo*, 73 M.J. at 187. "[O]rdinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced." *United States v. Kossman*, 38 M.J. 258, 261–62 (C.M.A. 1993).

Prejudice under *Barker* "should be assessed in the light of the three interests of the accused which the speedy trial right was designed to protect[:] . . . (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired." *United States v Guyton*, 82 M.J. 146, 155 (C.A.A.F. 2022) (alteration and ellipsis in original) (internal quotation marks and citation omitted). "Of these forms of prejudice, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* (internal quotation marks and citation omitted).

The remedy for an Article 10, UCMJ, violation is "dismissal with prejudice of the affected charges." *Kossman*, 38 M.J. at 262.

3. Analysis

Unless otherwise noted, we find sufficient evidence in the record to support the military judge's findings of fact. We review de novo whether those facts demonstrate a lack of reasonable diligence under Article 10, UCMJ, beginning with an analysis of the *Barker* factors.

a. Length of the Delay

The first factor under the *Barker* analysis serves as a "triggering mechanism," meaning that unless the period of delay is unreasonable on its face, "there is no necessity for inquiry into the other factors that go into the balance." *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (internal quotation marks and citation omitted). Here, the military judge found that, at the time of the hearing on this motion, Appellant "had spent over 400 days in pretrial

confinement." We agree with his conclusion that "[t]his is facially unreasonable and this factor weighs in favor of the Defense."

b. Reasons for the Delay

For this factor, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the [G]overnment." *Id.* (footnote omitted). But "[m]ore neutral reason[s] such as negligence or overcrowded courts should be weighted less heavily." *Id.* A "delay caused by the [D]efense weighs against the defendant." *Cooley*, 75 M.J. at 260 (internal quotation marks and citation omitted). In addition, "the Government has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial." *Cossio*, 64 M.J. at 258.

Appellant's primary contention is "Air Force Office of Special Investigations [ ] agents t[ook] 142 days to review DC3's eight-page extraction report." We perceive a significant difference between the report and the digital files in the results drive accompanying the report. While SA JC did not specify how long it took him to review the hundreds of thousands of files, we are confident it took considerably longer than review of an eight-page report.

The military judge found the processing of the "dozens of items of digital files" seized "required review of significant amounts of digital files." We find support in the record for the military judge's finding. He concluded this was "[t]he primary reason for pre-charging delay in this case." We add that OSI did more than review the DC3/CFL extraction report and results drives; they coordinated with a foreign country to obtain additional evidence of Appellant's possession of child pornography.

Appellant makes additional claims of lack of diligence. First, Appellant faults OSI not having "images or videos evaluated for sexual maturity until 25 February 2022." We note, however, that by 13 December 2021, the Government had identified an expert to conduct this review. Moreover, we find it not unreasonable for the Government in its investigations and prosecutions to narrow hundreds of thousands of files to a small fraction before requesting expert assistance and ultimately preferring charges.

Additionally, Appellant asserts the Government's delay from preferral to referral shows a lack of reasonable diligence. Appellant complains "it took the Government 26 days to refer charges [after waiver of the preliminary hearing]," and claims this was an unjustified delay. Appellant does not propose, however, what a reasonable period would be for the Government to process a preliminary hearing waiver, forward the preferred charges and supporting evidence from the special court-martial convening authority to the general court-martial convening authority for referral consideration, and for the general

court-martial convening authority to make a decision. The charges were referred 34 days after preferral and 26 days after the waiver was submitted. We find the Government was reasonably diligent here.

The military judge concluded "[t]he time between the preliminary hearing waiver and referral is reasonable in light of the relative novelty of Specifications 2 and 3 of Charge I [alleging indecent conduct] as well as the volume of evidence involved in this case." Regarding relative novelty, Appellant asserts the offense of indecent conduct is not novel. How the indecent conduct was charged, however, was unusual enough to prompt a motion to dismiss at trial and Appellant's assertions of error regarding Specification 2 of Charge I, discussed in Sections II.B and II.C *infra*, on appeal. However, the Government has not asserted this "relative novelty" was a reason for the delay. We give little weight to this novelty argument as we consider the Government's reasons for the delay.

Appellant also claims the Government was not reasonably diligent in notifying the trial judiciary to set a trial date. On this point, we agree with the military judge, who stated in his written ruling that the delay between service of charges on Appellant on 5 May 2022 and notice of referral to the trial judiciary on 31 May 2022 "is concerning and does not reflect reasonable diligence." However, we also agree with the military judge's finding and conclusion that "the Defense ready date reflected on [the trial judiciary] request was 26 September [2022], so this delay seems to have been irrelevant to the unavoidable delay between referral and the trial date."

Overall, the military judge found the reasons for delay to weigh in favor of the Government. We agree. The Government's investigation of Appellant involved review of hundreds of thousands of files and other digital media, in addition to processing warrants here and abroad. The Government identified, arranged, and utilized a pediatric expert to identify the ages of the children in the media, and a psychiatrist to conduct the Defense-requested sanity board. Finally, the Defense was not ready to go to trial until around four months after docketing. We find this *Barker* factor weighs in favor of the Government.

c. Demand for Speedy Trial

The military judge found that the Defense made five demands for speedy trial. We agree with his conclusion that "[t]his factor weighs in favor of the Defense."

d. Prejudice

The United States Supreme Court has identified three forms of cognizable prejudice under *Barker*, including oppressive pretrial incarceration, anxiety and concern, and—most seriously—impairment of the accused's defense. *Mizgala,* 61 M.J. at 129 (citing *Barker,* 407 U.S. at 532).

Appellant first argues the confinement itself is "inherently oppressive." However, "[g]iven that Article 10, UCMJ, is triggered only when an accused is *in* pretrial confinement, the prejudice prong of the balancing test triggered by pretrial confinement requires something more than pretrial confinement alone." *Cooley,* 75 M.J. at 262.

Next, Appellant argues prejudice in the form of denial of adequate medical care.[14] They assert the "military judge did not find prejudice because [Appellant] 'did not . . . provide examples' of the distress" in their testimony on the motion to dismiss. (Ellipsis in original). While the Government does have the ultimate burden to demonstrate it acted with reasonable diligence in bringing Appellant to trial in accordance with Article 10, UCMJ, balancing of the *Barker* factors requires Appellant to demonstrate prejudice. *See United States v. Wilson,* 72 M.J. 347, 355 (C.A.A.F. 2013) (finding appellant "failed to establish that the conditions of his confinement or any anxiety or concern that he suffered rose to the level of Article 10[, UCMJ,] prejudice"). During direct examination from trial defense counsel, Appellant stated the time in pretrial confinement impacted them mentally "greatly;" affected them emotionally "greatly," and psychologically "very greatly;" and agreed it "increased" their anxiety. The military judge found Appellant "testified baldly that his pretrial confinement has impacted him emotionally, psychologically and increased his anxiety. [Appellant] did not expand on or provide examples of these assertions." We find Appellant's general complaints of increased anxiety and being affected "greatly" or "very greatly" while confined did not sufficiently demonstrate prejudice.

Moreover, while Appellant utilized civilian-provided mental health care before he was confined, Appellant did not state they wanted to continue to receive this care. Appellant testified that he took advantage of similar care from a military provider during pretrial confinement. In one way, Appellant's medical care may have improved—Appellant's gender dysphoria was not diagnosed until after Appellant was placed in pretrial confinement. Finally, Appellant has not demonstrated that, but for being confined, they would have lived as a female.

Appellant also asserts the time in pretrial confinement "hindered [ ] their ability to assist with their defense." The military judge found that Appellant "has been able to review over 1,000 pages of discovery for the case and has not had his access to his defense counsel obstructed." While we give substantial deference to the military judge's findings of fact, his ruling does not fully address Appellant's hindrance claim on appeal. From our read of the record,

---

[14] For reasons discussed in Section II.D, *infra*, we find Appellant was not denied adequate medical care.

Appellant's inability to review materials was due in large part to the Defense's use of its office resources. Appellant did not claim he requested to view possible contraband evidence, including the charged images of child pornography, and was denied. Indeed, Appellant did not state what he intended to review but was unable to review due to their confinement status.

The military judge found that "[c]onsidering the conditions described by [Appellant], his pretrial confinement is not oppressive, appears to be set up to minimize his anxiety and concern and limits the possibility that his defense will be impaired in any way." The military judge weighted this prejudice factor in favor of the Government. We do as well.

e.* Barker *Analysis Conclusion

Considering the fundamental demand of Article 10, UCMJ, for reasonable diligence, and considering the *Barker* factors, we conclude Appellant was not denied their right to a speedy trial under Article 10, UCMJ. While length of the overall delay and Appellant's assertion of their right to a speedy trial weigh in favor of Appellant, both the lack of prejudice and the reasons for the delay from trial docketing to trial date weigh against Appellant. The Government's primary reason for the delays was a common one: the need "for the Government to marshal and weigh . . . forensic evidence[ ] before proceeding to trial." *Cossio*, 64 M.J. at 257. While the Government might have been able to move the case more expeditiously at some points in time, the relatively short delays and neutral reasons demonstrate the Government acted with reasonable diligence overall. Our review of the record, including the findings of fact made by the military judge, firmly convinces us that the Government proceeded to trial with reasonable diligence under the circumstances of the case, and Appellant was not denied their Article 10, UCMJ, right to a speedy trial.

B. Sufficiency of Convictions

Appellant claims error in the military judge's acceptance of their plea of guilty to possession of child pornography (Specification 1 of Charge I) and attempted distribution of child pornography (Specification of Charge II), and the military judge's finding of guilt, contrary to Appellant's plea of not guilty, to indecent conduct (Specification 2 of Charge I). Appellant's contentions center on the terminal element of Article 134, UCMJ, requiring the conduct be of a nature to bring discredit upon the armed forces. Appellant claims they were "found guilty of three specifications through unconstitutional conclusive presumptions" instead of distinct "proof of the terminal element."

1. Additional Background

a. Plea Inquiry

Towards the beginning of his inquiry into Appellant's pleas of guilty, the military judge defined service-discrediting conduct as "conduct which tends to harm the reputation of the service or lowers it in public esteem."

Such conduct was an element of the charged offense of Specification 1 of Charge I, under Article 134, UCMJ. Before the military judge asked Appellant specifically about this conduct in relation to this offense, Appellant said:

> . . . I understood that the content I was seeking was not legal.
>
> . . . .
>
> And I understood [the zip file I found] would likely contain pornographic content of persons who were below the age of 18.
>
> I know that these types of images are considered child pornography and are illegal to possess.
>
> . . . .
>
> I know that my behavior in 2021 was not acceptable. Society respects the honors of those serving in uniform and service members are expected to hold themselves to the highest and there and protect our society. Knowing that someone in uniform was actively looking for child pornography involving teenagers and in doing so downloaded and continue to possess the video described would bring discredit upon the armed services.

The following is from the end of the inquiry into Specification 1 of Charge I:

> [Military judge (MJ)]: Do you admit that your actions were of a nature to bring discredit upon the Armed Forces?
>
> [Appellant]: Yes, Your Honor. And that's because the public holds members who serve in high regard and any member acting in such a way brings discredit upon the Armed Forces.
>
> . . . .
>
> MJ: Do you agree and admit that your conduct was of a nature to bring discredit upon the Armed Forces?
>
> [Appellant]: Yes, Your Honor.

Appellant described what the community might think of the video they possessed:

> MJ: . . . . Do you believe that video to be obscene?

> [Appellant]: Yes, Your Honor.
>
> MJ: Why do you say that?
>
> [Appellant]: I believe it was obscene based on the fact that it was an adult female with what looked like a prepubescent female and exposing her genitalia to the recording device and basically masturbating the prepubescent child.
>
> MJ: Do you believe that an average person applying contemporary community standards would find that video as a whole that it appeals to the prurient interest in sex and portrays sexual conduct in a patently offensive way?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: Why do you say that?
>
> [Appellant]: I would say yes based on the generally accepted ideas of what obscene is and what would be illegal conduct to do to a minor child.

The Specification of Charge II, under Article 80, UCMJ, did not directly include service-discrediting conduct as an element. However, one element was that the act was done with specific intent to commit the offense of distribution of child pornography, and that attempted offense has the element of service-discrediting conduct. The following is from the inquiry into the Specification of Charge II:

> [Appellant]: Sir, I do believe that [the video] would be obscene just based on the facts that I believed at the time that she was a minor under the age of 18. That, you know, with the definition of obscene depicting minors engaging in sexually explicit conduct does not [sic] show prurient interest in sex or sexual conduct and is patently offensive that a reasonable person would not find any literary, artistic, or political value in the image that I possessed.
>
> MJ: Do you believe your actions were of a nature to bring discredit upon the Armed Forces?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: Why do you think that?
>
> [Appellant]: Once again based on the idea that service members are held in a higher standard and the possession or distribution or attempted distribution of child pornography would – is service discrediting action.

. . . .

MJ: Did you or do you admit that at the time that you sent that video [to the undercover agent] – the one we've been talking about where [AO] exposed [her] pubic region after lying on her bed . . . do you admit that you specifically intended at that time to commit the offense of distribution of child pornography?

[Appellant]: Yes, Your Honor.

. . . .

[Appellant]: . . . . [I]f [AO] had been under the age of 18, I would have committed an offense of distribution of child pornography.

b. Findings

The parties litigated Specification 2 of Charge I, alleging indecent conduct. In closing argument, the Defense argued the Government had not presented evidence sufficient to prove the charged conduct was service discrediting. In rebuttal, circuit trial counsel argued as follows:

> Your Honor, finally on service discrediting piece. I just briefly want to touch on this. Defense counsel cited that there is conduct that [by its nature] is enough to be service discrediting without having to put on specific evidence. And Your Honor, sending another dirty dad pictures, a video of how you're grooming your five-year-old daughter, that is conduct that is of a nature to bring discredit upon the Armed Forces. You heard testimony from Agent [DA] that he was aware that [Appellant] was in the Air Force. Your Honor, this is service discrediting. This is indecent conduct.

The Defense requested the military judge enter special findings supporting the factual basis of a finding of guilt. *See* R.C.M. 918(b). The Government did not oppose, and the military judge granted the request. The military judge entered findings on the only litigated specification resulting in a finding of guilty—Specification 2 of Charge I.

In his written findings, the military judge made several findings relating to SA DA's chat conversation with Appellant. He found that "the chat topic focused on whether each other were actively sexually with their daughters." He found that "[Appellant] sent SA [DA] a video of [Appellant's] 5[-]year-old daughter, [RP] sucking on his toe" with Appellant's description that "'she out of the blue sucked on [Appellant's] toe like a pro.'" The military judge described the video as "[RP] engaging in an action that is shockingly similar to one engaging in oral sex on a male's penis." In this video, the military judge thought RP "appear[ed] to be even younger" than five years. The military judge also

made findings relating to Appellant's comments about neighborhood children planning to play on a water slide at Appellant's home. He found the "context of the entirety of the conversation make clear that [Appellant's] statement indicated [Appellant's] present intent to record images or videos [of the children] in some 'perv' or perverted way."

Specifically in relation to the service-discrediting element of that offense,[15] the military judge found:

> (1) As part of SA [DA]'s investigation of [Appellant's] conduct in the private chat, he learned that [Appellant] was a member of the United States Air Force.
>
> (2) After the . . . chat conversation between SA [DA] and [Appellant] was complete, using IP address information and subscriber information, investigators learned from the internet service provider that [Appellant] resided on-base at . . . Great Falls, [Montana].

2. Law

a. Article 134, UCMJ

The UCMJ makes criminal "all conduct of a nature to bring discredit upon the armed forces . . . ." Article 134, UCMJ. The President defined the service-discrediting clause as follows:

> *Conduct of a nature to bring discredit upon the armed forces (clause 2).* "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

Manual for Courts-Martial, United States (2019 ed.) (*MCM*), pt. IV, ¶ 91.c.(3).

The United States Court of Appeals for the Armed Forces (CAAF) concluded that for an offense charged in violation of Clause 2 of Article 134, UCMJ, "proof of the conduct itself *may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces." *United States v. Phillips* 70 M.J. 161, 163 (C.A.A.F. 2011). The CAAF recently reaffirmed its holding in *Phillips*. *See United v. Wells*, ___ M.J. ___, No. 23-0219, 2024 CAAF LEXIS 552, at *12 (C.A.A.F. 24 Sep. 2024) ("Consistent with our precedent, we

[15] The military judge prefaced his findings on this element with: "In addition to the above findings [supporting the other elements], the following findings support the [c]ourt's conclusion that this element has been met beyond a reasonable doubt."

reiterate that whether any given conduct violates Clause 2 is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of conduct.").

In *Heppermann*, our court addressed service-discrediting conduct as the terminal element:

> "[T]he degree to which others became aware of the accused's conduct may bear upon whether the conduct is service discrediting," but actual public knowledge is not a prerequisite. "The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable doubt that [the appellant]'s conduct would tend to bring the service into disrepute if it were known."

82 M.J. at 801 (alterations in original) (quoting *Phillips*, 70 M.J. at 165, 166) (additional citation omitted).

The President also promulgated elements and definitions for the offenses of possession and distribution of child pornography under Article 134, UCMJ, and the offense of attempt under Article 80, UCMJ. *See MCM*, pt. IV, ¶¶ 95.b, c; 4.b, c.

The elements of possession of child pornography, as alleged in Specification 1 of Charge I, include that: (1) Appellant knowingly and wrongfully possessed child pornography; and (2) under the circumstances, Appellant's conduct was of a nature to bring discredit upon the armed forces. *See MCM*, pt. IV, ¶¶ 95.b.(1)(a), (b).

The elements of attempted distribution of child pornography, as alleged in the Specification of Charge II, include that: (1) Appellant did a certain overt act;[16] (2) the act was done with the specific intent to commit the offense of distribution of child pornography, an offense under the UCMJ; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense. *See MCM*, pt. IV, ¶¶ 4.b.(1)–(4). Element (2) required Appellant have the specific intent to commit the offense of distribution of child pornography in violation of Article 134, UCMJ. The elements of that offense are: (1) the accused knowingly and wrongfully distributed child pornography to another; and (2) under the circumstances, the

[16] Appellant does not challenge the military judge's recitation of this element: "That in the continental United States on 17 May 2021 you did a certain overt act that is attempt to knowingly and wrongfully distribute child pornography." We find no prejudice; the record indicates the parties understood the charged overt act was sending the video, not attempting to send the video.

accused's conduct was of a nature to bring discredit upon the armed forces. *See MCM*, pt. IV, ¶¶ 95.b.(3)(a), (b).

The elements of indecent conduct, as alleged in Specification 2 of Charge I, include that: (1) Appellant engaged in certain conduct, specifically "sending a video of [RP], a child who had not yet obtained the age of 12 years, sucking on the toe of [Appellant] to another person while discussing the possibility of engaging in lewd acts with [RP] and other female children in the future;" (2) the conduct was indecent; and (3) under the circumstances, Appellant's conduct was of a nature to bring discredit upon the armed forces. *See MCM*, pt. IV, ¶¶ 104.b.(1)–(3).

b. Guilty Plea Inquiries

A military judge's decision to accept a guilty plea is reviewed for abuse of discretion, and questions of law arising from the guilty plea are reviewed de novo. *United States v. Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

"We give the military judge broad discretion in the decision to accept a guilty plea because the facts are undeveloped in such cases." *Id*. (citing *Inabinette*, 66 M.J. at 322). "[I]n reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show 'a substantial basis in law and fact for questioning the guilty plea.'" *Inabinette*, 66 M.J. at 322 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

"The plea inquiry must establish the factual predicate for the plea," including "a factual basis for concluding that appellant's conduct was service discrediting" when so alleged under Article 134, UCMJ. *United States v. Jordan*, 57 M.J. 236, 239–40 (C.A.A.F. 2002) (footnote omitted).

3. Analysis

a. Guilty Pleas

Appellant asserts the "military judge abused his discretion by failing to illicit [sic] evidence of the service discrediting nature of [Appellant's] conduct during the [guilty-plea] inquiry" into the offenses of possession of child pornography (Specification 1 of Charge I) and attempted distribution of child pornography (Specification of Charge II). We disagree.

Appellant told the military judge, under oath, that the possession of child pornography to which they pleaded guilty would and did bring discredit upon the armed forces. Appellant stated: "Knowing that someone in uniform was actively looking for child pornography involving teenagers and in doing so downloaded and continue to possess the video described would bring discredit upon the armed services." But Appellant also stated their actions were of a

nature to bring discredit upon the armed forces because "any member acting in such a way *brings* discredit upon the Armed Forces." (Emphasis added).

Appellant provided a factual basis for their conduct being of a nature to bring discredit upon the armed forces. In addition to the charged conduct of simply possessing child pornography, Appellant added that "actively looking for child pornography involving teenagers" and downloading it would bring discredit and "any member acting in such a way *brings discredit* upon the Armed Forces." Moreover, in discussing its obscenity, Appellant admitted that the "community" would find the video Appellant possessed to "portray sexual conduct in a patently offensive way" because it depicted "what would be illegal conduct to do to a minor child." These facts support Appellant's admissions that their possession was of a nature to bring discredit upon the armed forces under Article 134, UCMJ. *See Jordan*, 57 M.J. at 239 (reviewing court can look to entire record to determine whether a plea was provident).

Appellant stated they would have completed the act of distribution of child pornography if the image they sent to an undercover agent was of a person under 18 years of age. Appellant admitted specifically intending the elements of the attempted offense. Regarding how they intended to commit service-discrediting conduct, Appellant referred back to their statement made in relation to the possession specification: "Once again based on the idea that service members are held in a higher standard [ ] the possession or distribution or attempted distribution of child pornography would – is service discrediting action."

Appellant provided a factual basis for intending to distribute child pornography, including intending that their conduct would be of a nature to bring discredit upon the armed forces. Appellant admitted that "attempted distribution of child pornography would – *is service discrediting action*." (Emphasis added). Appellant repeated that "service members are held in a higher standard." Regarding the obscenity of this video, Appellant stated, "I believe the society considers [child pornography] obscene" and Appellant "hit send multiple times in sending videos to the undercover agent." These facts support Appellant's admissions that he attempted to distribute child pornography, including intending to participate in conduct of a nature to bring discredit upon the armed forces under Article 134, UCMJ.

b. Findings

Appellant argues we should not apply *Phillips*, asserting the CAAF in that case created an "unconstitutional conclusive presumption": whether conduct meets the service-discrediting element "can be presumed from the underlying misconduct."

Appellant asserts "[n]o evidence at trial constituted proof of the terminal element." Yet Appellant also asserts the military judge's special findings "found that evidence for the first two elements of Article 134, [UCMJ,] indecent conduct, satisfy the terminal element." Appellant argues the testimony of investigators was "insufficient to satisfy the terminal element beyond a reasonable doubt because no evidence was elicited . . . that they believed the conduct to be service discrediting or that their view of the Armed Forces was altered in any way."

We follow *Wells* and *Heppermann*, and determine Appellant's conviction for Specification 2 of Charge I was not the result of an "unconstitutional conclusive presumption." The factfinder is not limited to consideration of direct evidence of whether the reputation of the Air Force was discredited, or would have been discredited if the misconduct was known. *See Heppermann*, 82 M.J. at 802. "[T]he military judge could consider other evidence in determining whether Appellant's conduct tended to discredit the service." *Id.* (citing *United States v. Anderson*, 60 M.J. 548, 555 (A.F. Ct. Crim. App. 2004)) (additional citation omitted).

We find the military judge had a sufficient basis from the evidence introduced during the litigated portion of the trial to determine beyond a reasonable doubt that Appellant's conduct charged in Specification 2 of Charge I was of a nature to bring discredit upon the armed forces. The evidence demonstrated Appellant used an online chat platform for fathers to communicate about engaging in inappropriate acts with daughters, used that platform to send a video of their daughter mimicking oral sex, and discussed video recording other children in a perverted way. Appellant did not know the person with whom they chatted, and that person learned Appellant was a member of the United States Air Force. We conclude Appellant was not convicted "through an unconstitutional conclusive presumption."

C. Indecent Conduct

Appellant asserts their acts charged as indecent conduct under Article 134, UCMJ, amounted to speech protected by the First Amendment. Specifically, Appellant claims their language was not obscene,[17] and therefore was protected speech, and moreover, the Government failed to prove a connection to the military environment. We find no relief is warranted.

1. Additional Background

Specification 2 of Charge I reads, in part, that Appellant:

---

[17] Appellant does not directly assert the military judge misapprehended the meanings of "indecent" or "obscene."

> Did . . . commit indecent conduct, to wit: sending a video of [RP], a child who had not yet obtained the age of 12 years, sucking on the toe of [Appellant] to another person while discussing the possibility of engaging in lewd acts with [RP] and other female children in the future . . . .

As this was a military judge-alone trial, the military judge did not articulate elements and definitions for the specification alleging indecent conduct. However, in relation to Specification 1 of Charge I—possession of child pornography to which Appellant pleaded guilty—the military judge defined "obscene" for Appellant as follows:

> Obscene means that the average person applying contemporary community standards would find that the visual images depicting minors engaging in sexually explicit conduct when taken as a whole appeal to the prurient interest in sex and portrays sexual conduct in a patently offensive way that a reasonable person would not find serious literary, artistic, political, or scientific value in the visual images depicting minors in engaging in sexually explicit conduct.

In support of this assignment of error, where Appellant argues that "[o]bscenity is a category of unprotected speech," Appellant provides a similar definition of obscene:

> (1) [An] average person, applying contemporary community standards would find [the speech], taken as a whole, appeals to the prurient interest;
>
> (2) [The speech] depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
>
> (3) [The speech], taken as a whole, lacks serious literary, artistic, political, or scientific value.

(Alterations in original) (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

2. Law

We review de novo whether a statute is unconstitutional as applied. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (citation omitted).

Article 134, UCMJ, prohibits "conduct of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934. Among the offenses the President enumerated under Article 134, UCMJ, is indecent conduct. *See United States v. Rocha*, 84 M.J. 346, 350 (C.A.A.F. 2024) (citing *MCM*, pt. IV, ¶ 104.b). The President explained: "'Indecent' means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and

tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, pt. IV, ¶ 104.c.(1).

The CAAF "has long held that 'indecent' is synonymous with obscene." *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019) (citation omitted). "It is well-settled law that obscenity is not speech protected by the First Amendment, regardless of the military or civilian status of the 'speaker.'" *Id.* (citations omitted). Speech conveying "'repugnant sexual fantasies involving children'" that "appealed, and was intended to appeal, to the prurient interest" is not protected speech. *Id.* (citation omitted).

In *Meakin*, the CAAF noted the appellant's "obscenity was not contained within his home for consideration within his own mind" but instead the appellant "transmitted his written obscenities" to "individuals whose true names he did not even know and whom he had not met." *Id.* at 402–03. The CAAF found such speech was not constitutionally protected. *Id.* at 403.

In cases where an appellant was convicted for speech charged as service discrediting under Article 134, UCMJ, courts first determine whether the speech "is protected speech under the First Amendment," then analyze "whether the Government has shown a reasonably direct and palpable connection between the speech and the military mission or military environment." *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008). The Government must "prove a direct and palpable connection to the military mission or environment not only when it is clear that the First Amendment would protect speech in a civilian context, but also in cases . . . where a court cannot determine whether the speech would be protected." *United States v. Grijalva*, 84 M.J. 433, 2024 CAAF LEXIS 358, at *13–14 (C.A.A.F. 26 Jun. 2024) (citation omitted).

Categories of speech not protected by the First Amendment

> include: (1) incitement to imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech presenting some grave and imminent threat the Government has the power to prevent.

United States v. Smith, ___ M.J. ___, No. 23-0207, 2024 CAAF LEXIS 527, at *9 (C.A.A.F. 13 Sep. 2024) (citation omitted).

3. Analysis

Appellant maintains "that their purely private communications with another adult did not constitute obscenity." Appellant also questions the CAAF's holdings that "indecent" is synonymous with "obscene."

First, we note Appellant fails to explain why their conduct was not obscene even under their own definition of obscene speech. That is, Appellant does not assert the language did not (1) appeal to the prurient interest, (2) depict or describe, in a patently offensive way, sexual conduct with a minor, and (3) lack serious literary, artistic, political, or scientific value.

The Government argues "the video of Appellant's daughter sucking on Appellant's toe is obscene in and of itself." Additionally, the Government argues Appellant's conversation with "a stranger" focused on sex, incest, and children, and Appellant's intention to record children in some "perverted way" all support a finding of obscenity.

We reject Appellant's argument that Appellant's language was not obscene because it consisted of "purely private communications with another adult." Similar to the CAAF's findings in *Meakin*, Appellant's "obscenity was not contained within his home for consideration within his own mind" but instead "transmitted" to SA DA, an "individual[ ] whose true name[ ] he did not even know and whom he had not met." *Id.* at 402–03. We find the CAAF's considerations of "indecent" and "obscene" in *Meakin* to be controlling in this case. And as the CAAF did in *Meakin*, we find Appellant's speech was not constitutionally protected. *Id.* at 403.

Finally, we easily resolve against Appellant their argument that analysis under *Wilcox* would result in relief. We found Appellant's speech was not constitutionally protected speech. Even if that determination were a close call, we discern a direct and palpable connection to the military environment in this case. Appellant's speech included communications about Appellant's daughter, a military dependent, and was accompanied with a video of her sucking Appellant's toe that Appellant recorded in their shared home on a military installation.

We find Appellant was not convicted for speech protected by the First Amendment.

D. Conditions of Confinement

Appellant asserts the "Government's failure to provide [Appellant] with any gender dysphoria treatment for three years amounts to deliberate indifference of a serious medical need" and, as a result, Appellant's "right against cruel and unusual punishment was violated." Appellant's requested remedy is the sentence to a punitive discharge be "set aside or otherwise disapproved." We find Appellant has failed to demonstrate entitlement to relief under *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006), and deny relief.

1. Additional Background

Appellant was confined first at Malmstrom AFB, Montana. Pretrial confinement began on 8 July 2021, and post-trial confinement began on 28 September 2022. Appellant was transferred to the Navy Consolidated Brig (NAVCONBRIG), Charleston, South Carolina, in December 2022. Appellant's informal complaint during the end of their time at NAVCONBRIG provides some history of Appellant's requests for treatment there.

On 18 June 2024, Appellant filed an informal complaint pursuant to Article 138, UCMJ, 10 U.S.C. § 938, and Air Force Instruction (AFI) 51-505, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice* (Apr. 2019), to the commander of the Air Force Security Forces Center (AFSFC). Appellant alleged in this complaint that despite repeated requests that they "receive medical care to manage the symptoms of [their] GD [(gender dysphoria)]," Appellant "ha[s] not received the requisite medical care." Appellant specifically requested hormone therapy. Appellant asserted denial of treatment "caused [Appellant] significant harm, including immense clinical distress associated with untreated GD."

Appellant attached to their informal complaint medical information, treatment requests, confinement clinic notes, and treatment plan memoranda. One document is a memo from Lieutenant Colonel (Lt Col) JS, the medical director of the Transgender Health Medical Evaluation Unit (THMEU) at Joint Base San Antonio-Lackland, Texas, to Appellant, dated 21 September 2023. The THMEU evaluated Appellant's diagnosis of GD from 1 June 2022, confirmed the diagnosis on 24 August 2023, and signed a medical treatment plan (MTP) on 21 September 2023. The plan included "Gender Affirming Hormone Therapy (GAHT) with an estimated start date of October 2023." The memo stated Appellant was required to obtain commander concurrence. The MTP identifies Appellant's unit and commander as those at the time of the court-martial at Malmstrom AFB, not a confinement commander. Appellant signed a memo notifying the AFSFC Commander of the MTP on 30 January 2024.[18]

The earliest-dated confinement treatment request Appellant attached to their Article 138, UCMJ, request is dated 7 September 2023, shortly before the MTP was issued. It shows Appellant requested an "appointment to discuss medication, and schedule next appointment with them," and the response indicated Appellant discontinued a medication and they were "pending action from THMEU." On 28 September 2023, Appellant requested an "update on ETP [(exception to policy)] letters" and "medication start date" as referenced in the MTP. The response was another note to follow up with THMEU. On

[18] Our review of the record does not indicate whether this memo was received.

11 October 2023, Appellant asked again about the medication start date. The response stated Appellant's "paperwork has been forwarded to the Air Force Confinement and Corrections legal team for review[;] this process may take some time." Appellant reached out to the NAVCONBRIG Commander and the "Air Force Confinement Legal Team" in November and December 2023 respectively, urging swift action to approve the MTP.

Appellant made a request on 14 March 2024 "to speak to Dr. C about medication changes" and "other mental health concerns," and that they were still awaiting commander responses on the MTP. The response was Appellant had an appointment with the doctor and was provided the status of the MTP.

On 21 April 2024, Appellant wanted to "discuss changes to MTP & resubmit to commander for signature." On 28 May 2024, Appellant requested an "update of approval for medical and treatment plan," adding "currently 39 days till release from confinement." The response was that it was still "pending with Air[F]orce legal."

The AFSFC Commander dismissed Appellant's informal complaint on 1 July 2024. The commander cited AFI 51-505, ¶ 1.3.3.1, to explain that "acts or omissions that were not initiated, carried out or approved by your commander are not eligible for Article 138[, UCMJ,] review." He continued, stating:

> I was not aware of your diagnosis or request for GD treatment until I received an email from your Defense Counsel on 18 June 2024. Not only did I not make any act or omission with respect to your requests for treatment, but I am also not aware of any other commander that took any action with respect to your requests for treatment.

Appellant has not moved to attach a declaration for this court to consider Appellant's personal claims of denial of treatment.

We granted the Government's motion to attach three declarations addressing Appellant's claims. The declaration from the assistant noncommissioned officer in charge of the confinement facility at Malmstrom AFB states they have no records "related to [Appellant's] gender dysphoria while [Appellant] was in confinement" there. However, Appellant "was sent to mental health many times under [Appellant's] own request."

Another declaration is from "the main contact for coordinating [Appellant's] psychiatric and transgender health care," Technical Sergeant (TSgt) KD.[19] She

[19] Technical Sergeant KD was the staff member who responded to Appellant's confinement treatment requests.

asserted Appellant "was not denied medical treatment of any kind, including for gender dysphoria." She outlined in detail the efforts and challenges in getting Appellant GD healthcare.[20] She explained that "[g]ranting an Exception to Policy for dress and appearance and for use of facilities, in addition to receiving hormonal treatment to transition to female, while at an all-male Brig, required the need for guidance from both the Air Force and the Navy." She worked with Appellant to arrange "a telehealth kiosk [for Appellant] to have confidential telehealth appointments required by . . . THMEU," because Appellant was "the first prisoner to interact with THMEU at NAVCONBRIG." THMEU and NAVCONBRIG started making arrangements for this care as early as January 2023. At different points, Appellant told TSgt KD they did not want to pursue the exception to policy, but did want hormone therapy. TSgt KD does not state whether the MTP was ever approved; the last entry in her timeline is 27 June 2024, when Appellant was notified "the Brig offered him the ability to grow out hair and nails."

The third declaration is from Mr. EO, Director, Air Force Confinement and Corrections.[21] He first explained Appellant's confinement release dates:

> [Appellant] declined to complete or participate in necessary sex offender treatment. He was originally set to be released in Dec[ember 20]23 to mandatory supervised release (MSR). He declined to provide a suitable reintegration to society plan prior to the Dec[ember 20]23 release. He was found "At Fault" by the Air Force Clemency and Parole Board, for not providing suitable reintegration plan[;] this action pushed his confinement release date out until 6 Jul[y 20]24.

Mr. EO then also described Air Force coordination of Appellant's requests for GD treatment.

> Prior to [Appellant's court-m]artial, he was seeking medical care for potential Gender Dysphoria (GD). He was medically cleared to seek further specific GD treatment in Aug[ust]/Sep[tember 20]23. [Appellant] requested to continue down the GD medical route in Oct[ober 20]23 which is when my office first learned of the GD medical issue. His paperwork was incomplete and sent back to NAVCON Brig Charleston for [Appellant] to update.

---

[20] She noted Appellant "received treatment and counseling on numerous occasions from the brig psychiatrist for other mental health concerns and medication that was separate from his gender dysphoria."

[21] Mr. EO's office appears to be the "Legal" office referenced by TSgt KD.

> . . . .
>
> [Appellant] re-accomplished his request for transgender treatment paperwork Jan[uary 20]24 and legal advice was sought again this time through Lt Col W[,] AFIMSC[22 legal advisor]; Lt Col W[ ] suggested contacting the Transgender Health Medical Evaluation Unit (THMEU) Medical Lead Lt Col [J]S for guidance. Lt Col [J]S did not provide guidance as to whether the member needed to immediately begin the GD medication and understood my initial concerns for the member to start treatment while in custody. In fact, at the time of the THMEU approval for GD treatment, it was not known by the THMEU that [Appellant] was in confinement. The THMEU team did not know the member had been charged with sex crimes against his own child. My concern was if the member started treatment in confinement and had a break due to release from confinement. Then further delay in constant care/medication to the member that he would be at risk medically causing a hardship or harm. Additional concerns for me were NAVCON Brig Charleston was not a suitable location to begin GD transition, appropriate medication to be given could not be confirmed available at NAVCON Brig Charleston, NAVCON Brig Charleston would be forced to house [Appellant] in segregated housing, and finally the member had a short time left on their sentence. Based on the circumstance, the member's request was never denied, it was pending legal and further medical review.[23]
>
> . . . .
>
> [The AFSFC Commander] approved for [Appellant] to initiate further transgender treatment provided by Tricare [medical insurance] once he released from confinement and set up residence in the civilian populace.

Like Technical Sergeant KD, Mr. EO noted the novelty of Appellant's situation. "There is no [Department of Defense] guidance with respect to GD diagnosis within the military confinement world . . . ."

---

[22] The Air Force Security Forces Center is a subordinate unit of the Air Force Installation and Management Support Center. *Air Force Security Forces Center*, AIR FORCE INSTALLATION & MISSION SUPPORT CENTER, https://www.afimsc.af.mil/About-Us/ (last visited 24 Sep. 2024).

[23] On this last point, for purposes of analysis we consider failure to approve Appellant's request to be a de facto denial.

2. Law

Under this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), mandate to approve only so much of the sentence as we find "correct in law," we cannot affirm "an unlawful sentence, such as one that violates the prohibition against cruel and unusual punishment in the Eighth Amendment and Article 55, UCMJ[, 10 U.S.C. § 855]." *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020) (citing *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001)).

"In general, we apply the [United States] Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, UCMJ, except where legislative intent to provide greater protections under Article 55, UCMJ, is apparent." *United States v. Gay*, 74 M.J. 736, 740 (A.F. Ct. Crim. App. 2015) (citation omitted), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). To demonstrate a violation of the Eighth Amendment, an appellant must show:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ . . . .

Lovett, 63 M.J. at 215 (first ellipsis in original) (internal quotation marks and citations omitted). "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotation marks and citation omitted).

"Denial of adequate medical attention can constitute an Eighth Amendment or Article 55[, UCMJ,] violation." *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001) (citing *United States v. Sanchez*, 53 M.J. 393, 396 (C.A.A.F. 2000)). However, the standard is "reasonable" medical care rather than "perfect" or "optimal" care. *Id.* at 475. (citation omitted). The Eighth Amendment prohibits "deliberate indifference to serious medical needs of prisoners," whether manifested by prison officials "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (citations omitted); *see also Ziglar v. Abbasi*, 582 U.S. 120, 148 (2017) (noting the United States Supreme Court "has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—'deliberate indifference to serious medical needs'" (quoting *Estelle*, 429 U.S. at 104)). Thus, to support an Eighth Amendment or Article 55, UCMJ, claim of inadequate medical treatment, an appellant must allege both deliberate indifference and "that he suffered, or was put at risk of suffering, serious harm." *United States v. Pullings*, 83 M.J. 205, 213–14 (C.A.A.F. 2023) (citing *Estelle*, 429 U.S. at 104, 106). "Deliberate

indifference" requires that the responsible official must be aware of an excessive risk to an inmate's health or safety and disregard that risk. *Farmer*, 511 U.S. at 837. "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842 (citation omitted). One may infer "a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* (citation omitted). However, "prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment . . . ." *Id.* at 844.

"A [confinee] must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *United States v. Wise*, 64 M.J. 468, 471 (C.A.A.F. 2007) (citation omitted); *see also White*, 54 M.J. at 472. "This generally means that the prisoner will have exhausted the detention center's grievance system and petitioned for relief under Article 138, UCMJ." *United States v. Henry*, 76 M.J. 595, 610 (A.F. Ct. Crim. App. 2017). "Exhaustion requires [an a]ppellant to demonstrate that two paths of redress have been attempted, each without satisfactory result," specifically, the prisoner-grievance system and the Article 138, UCMJ, complaint process. *Wise*, 64 M.J. at 471.

3. Analysis

We note at the outset that we do not equate Appellant's Article 138, UCMJ, informal complaint to an affidavit or declaration.[24] The factual assertions Appellant made in that complaint are neither sworn nor made under penalty of perjury. We have no issue of "conflicting affidavits submitted by the parties" to resolve. *See United States v. Fagan*, 59 M.J. 238, 242 (C.A.A.F. 2004) (citing *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997)).

On appeal, Appellant claims they were denied any treatment for gender dysphoria while in confinement, to include "hormone and cognitive/behavioral therapy." First, we find support lacking for Appellant's contention that he requested but was denied cognitive or behavioral therapy. TSgt KD noted Appellant repeatedly requested hormone therapy, but neither her declaration nor Appellant's confinement treatment requests indicate Appellant requested cognitive or behavioral therapy. Similarly, we find support lacking for Appellant's contention that while confined at Malmstrom AFB Appellant requested but was denied cognitive or behavioral therapy, or requested and was denied any medical or mental health care. The declarations indicate Appellant was able to

[24] *See* JT. CT. CRIM. APP. R. 23(b)(2) ("If a party desires to attach a statement of a person to the record for consideration by the Court on any matter, such statement shall be made either as an affidavit or as an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746.").

receive mental health treatment while confined at both at Malmstrom AFB and NAVCONBRIG.

It appears Appellant's primary claim is that the treatment plan—the MTP—addressing hormonal medication was not approved and implemented. Such claim is supported by the record; however, to prevail on a claim under the Eighth Amendment and Article 55, UCMJ, an appellant must satisfy all three prongs of *Lovett.* Appellant has not demonstrated a culpable state of mind on the part of prison officials. *Lovett*, 63 M.J. at 215. Moreover, we conclude from our review of the declarations that officials were not indifferent to Appellant's health or safety. *Id.* TSgt KD worked with other confinement officials and Appellant for over a year for Appellant to receive medical and mental health care during their confinement. Mr. EO claimed his office's actions were motivated in part to ensure Appellant's health and safety.

Appellant has failed to demonstrate that they "suffered, or was put at risk of suffering, serious harm," *Pullings*, 83 M.J. at 213–14, or that prison officials were "aware of an excessive risk to an inmate's health or safety and disregard[ed] that risk," *Farmer*, 511 U.S. at 837. In Appellant's Article 138, UCMJ, informal complaint, Appellant asserted he suffered "immense clinical distress associated with untreated GD." However, the record does not support this assertion that Appellant suffered serious harm. Confinement officials had concerns about the availability of GD-treatment medications throughout Appellant's time in confinement, and whether a break in treatment due to release from confinement may cause Appellant harm medically. Lt Col JS at THMEU understood these concerns as relayed by Mr. EO, and did not advise that Appellant should begin GD medication immediately. More importantly, the record does not support a conclusion that confinement officials knew any earlier than 18 June 2024—the date of the informal complaint—that Appellant was suffering or could suffer serious harm.[25]

Appellant has not satisfied all three prongs of *Lovett* for their complaints of Eighth Amendment and Article 55, UCMJ, violations. We find no relief is warranted.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.

---

[25] For purposes of our analysis, we consider the AFSFC Commander a confinement official. In his reply to the informal complaint, the AFSFC Commander stated he "was not aware of [Appellant's] diagnosis or request for GD treatment until [he] received an email from [Appellant's] Defense Counsel on 18 June 2024."

Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

Appendix B (DAFI 51-201)

is earlier, via email to the recipients listed on the template memorandum located on the VMJD. If any portion of the punishment is deferred, suspended, set aside, waived, or disapproved, the memorandum must include the terms. A template memorandum can be found on the VMJD.

20.38.2. **24 Hour Memorandum.** If the EoJ is published more than 14 days after the sentence is announced, the SJA of the office that prosecuted the case must send a memorandum within 24 hours after the EoJ via email to the recipients listed on the template memorandum located on the VMJD. If any portion of the punishment is deferred, suspended, set aside, waived, or disapproved, the memorandum must include the terms. A template memorandum can be found on the VMJD.

Section 20I—EoJ (R.C.M. 1111; Article 60c, UCMJ).

20.39. General Provision. The EoJ reflects the results of the court-martial after all post-trial actions, rulings, or orders, and serves to terminate trial proceedings and initiate appellate proceedings. The EoJ must be completed in all GCMs and SPCMs in which an accused was arraigned, regardless of the final outcome of the case. For post-trial processing in an SCM, see **Section 23F.** In any case in which an accused was arraigned and the court-martial ended in a full acquittal, mistrial, dismissal of all charges, or is otherwise terminated without findings, an EoJ must be completed (to include the first indorsement) when the court terminates. For cases resulting in a finding of not guilty by reason of lack of mental responsibility, the EoJ must be completed after the subsequent hearing required by R.C.M. 1111 (e)(1) and R.C.M. 1105.

20.40. Preparing the EoJ.

20.40.1. Minimum Contents. Following receipt of the CADAM and issuance of any other post-trial rulings or orders, the military judge must ensure an EoJ is prepared. **(T-0).** Military judges should wait five days after receipt of the CADAM to sign the EoJ. This ensures parties have five days to motion the military judge to correct an error in the CADAM in accordance with R.C.M. 1104 (b)(2)(B). The EoJ must include the contents listed in R.C.M. 1111(b), and the STR must be included as an attachment. **(T-0).** Practitioners must use the format and checklists for the EoJ that is posted on the VMJD.

20.40.2. Expurgated and Unexpurgated Copies of the EoJ. In cases with both an expurgated and unexpurgated Statement of Trial Results, both an expurgated an unexpurgated EoJ must be prepared and signed by the military judge. In arraigned cases in which the court-martial ended in a full acquittal, mistrial, dismissal of all charges, or is otherwise terminated without findings, refer **to paragraph 20.8** to determine whether an expurgated EoJ is required and the distribution requirements for expurgated and unexpurgated copies.

20.41. First Indorsement to the EoJ. After the EoJ is signed by the military judge and returned to the servicing legal office, the SJA signs and attaches to the EoJ a first indorsement, indicating whether the following criteria are met: DNA processing is required; the accused has been convicted of a crime of domestic violence under 18 U.S.C. 922(g)(9); criminal history record indexing is required under DoDI 5505.11; firearm prohibitions are triggered; and/or sex offender notification is required. See **Chapter 29** for further information on this requirement. Templates are located on the VMJD. The first indorsement is distributed with the EoJ. **Note:** This requirement is not delegable. Only the SJA or other judge advocate acting as the SJA may sign the

first indorsement. In the latter case, the person signing the first indorsement indicates "Acting as the Staff Judge Advocate" in the signature block.

20.42. Distributing the EoJ. The EoJ and first indorsement must be distributed in accordance with the STR/EoJ Distribution List on the VMJD within five duty days of completion.

Section 20J—Post-Trial Confinement

20.43. Entry into Post-Trial Confinement. Sentences to confinement run from the date adjudged, except when suspended or deferred by the convening authority. Unless limited by a commander in the accused's chain of command, the authority to order post-trial confinement is delegated to the trial counsel or assistant trial counsel. See R.C.M. 1102(b)(2). The DD Form 2707, *Confinement Order*, with original signatures goes with the accused and is used to enter an accused into post-trial confinement.

20.44. Processing the DD Form 2707.

20.44.1. When a court-martial sentence includes confinement, the legal office should prepare the top portion of the DD Form 2707. Only list the offenses of which the accused was found guilty. The person directing confinement, typically the trial counsel, fills out block 7. The SJA fills out block 8 as the officer conducting a legal review and approval. The same person cannot sign both block 7 and block 8. Before signing the legal review, the SJA should ensure the form is properly completed and the individual directing confinement actually has authority to direct confinement.

20.44.2. Security Forces personnel receipt for the prisoner by completing and signing item 11 of the DD Form 2707. Security Forces personnel ensure medical personnel complete items 9 and 10. A completed copy of the DD Form 2707 is returned to the legal office, and the legal office includes the copy in the ROT. Security Forces retains the original DD Form 2707 for inclusion in the prisoner's Correctional Treatment File.

20.44.3. If an accused is in pretrial confinement, confinement facilities require an updated DD Form 2707 for post-trial confinement.

20.44.4. Failure to comply with these procedural processes does not invalidate or prevent post-trial confinement or the receipt of prisoners. See Articles 11 and 13, UCMJ.

20.45. Effect of Pretrial Confinement. Under certain circumstances, an accused receives day-for-day credit for any pretrial confinement served in military, civilian (at the request of the military), or foreign confinement facilities, for which the accused has not received credit against any other sentence. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984); *United States v. Murray*, 43 M.J. 507 (AFCCA 1995); and *United States v. Pinson*, 54 M.J. 692 (AFCCA 2001). An accused may also be awarded judicially ordered credit for restriction tantamount to confinement, prior NJP for the same offense, violations of R.C.M. 305, or violations of Articles 12 or 13, UCMJ. See e.g., *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

20.45.1. When a military judge directs credit for illegal pretrial confinement (violations of Articles 12 or 13, UCMJ, or R.C.M. 305), the military judge should ensure credit is listed on the STR and EoJ.

20.45.2. Any credit for pretrial confinement should be clearly reflected on the STR, EoJ and DD Form 2707, along with the source of each portion of credit and total days of credit awarded.

Chapter 29

SEX OFFENDER NOTIFICATION, CRIMINAL INDEXING AND DNA COLLECTION

Section 29A—Sex Offender Notification

29.1. General Provision. If the member has been convicted of certain "qualifying offenses" potentially requiring sex offender registration the DAF is required to notify federal, state, and local officials. **(T-0).** As noted in the STR/EoJ Distribution List on the VMJD, a copy of the STR and EoJ, to include attachments and the first indorsements, including any placement of the accused on excess or appellate leave status, must be distributed to the AFSFC, **afcorrections.appellateleave@us.af.mil**, and DAF-CJIC, **daf-cjic@us.af.mil**.

29.2. Qualifying Offenses. See DoDI 1325.07 for a list of offenses which require DAF notification to federal, state, and local officials.

29.2.1. Federal, state and local governments may require an individual to register as a sex offender for offenses that are not included on this list; therefore, this list identifies offenses for which notification is required by the DAF but is not inclusive of all offenses that trigger sex offender registration.

29.2.2. When a question arises whether a conviction triggers notification requirements, SJAs should seek guidance from a superior command level legal office. Questions about whether an offense triggers notification requirements may be directed to the DAF-CJIC Legal Advisor (HQ AFOSI/JA)

29.3. Notification Requirement. The DAF must notify federal, state, and local officials when a DAF member is convicted of a qualifying offense at GCM or SPCM. This requirement applies regardless of whether or not the individual is sentenced to confinement. See DoDI 1325.07, and AFMAN 31-115, Vol 1. The DAF executes this requirement via AF confinement officer/NCO/liaison officer notification to the relevant jurisdictions using the DD Form 2791, *Notice of Release/Acknowledgement of Convicted Sex Offender Registration Requirements*. See AFMAN 71-102, Chapter 3.

29.4. Timing of Notification.

29.4.1. In cases where the member is sentenced to and must serve post-trial confinement, the notification must be made prior to release from confinement. **(T-0). Note:** The member may not be held beyond the scheduled release date for purposes of making the required notifications. This notification is accomplished by the security forces confinement officer, or designee responsible for custody of the inmate, in accordance with the requirements detailed in AFMAN 31-115, Vol 1; AFMAN 71-102; and DoDI 5525.20, *Registered Sex Offender (RSO) Management in Department of Defense*. **(T-0).**

29.4.2. In cases where the offender will not serve post-trial confinement either because (1) no confinement was adjudged, or (2) confinement credit exceeds adjudged confinement, the SJA must notify the servicing confinement NCO/officer or SFS/CC in writing within 24 hours of conviction. Once informed by the SJA that the member was convicted of a qualifying offense, the confinement officer or SFS/CC ensures the notifications are made in accordance with AFMAN 71-102, AFMAN 31-115V1, and DoDI 5525.20.

29.5. Legal Office Responsibilities. SJAs are not responsible for directly notifying federal, state and local law enforcement of qualifying convictions. However, SJAs must ensure their support responsibilities are accomplished in order to ensure the DAF is meeting its obligations under federal law and DoD policy. SJAs facilitate the notification requirement in two ways: (1) completion and distribution of post-trial paperwork in accordance with this instruction and the STR/EoJ Distribution List on the VMJD; and (2) notification of the installation confinement officer/NCO in cases where the offender is convicted but not required to serve post-trial confinement, in accordance with this instruction. See **paragraph 29.6** and **paragraph 29.7** and AFMAN 71-102, Chapter 3.

29.6. STR and EoJ. If a member is convicted of a qualifying offense referred to trial by general or special court-martial on or after 1 January 2019, the appropriate box must be initialed on the first indorsement of the STRs and the EoJ by the SJA. The first indorsement format, and guidance for completion are located on the VMJD.

29.7. Notification to the Installation Confinement Officer/NCO. In cases where the member was convicted of a qualifying offense at a general or special court-martial but no post-trial confinement will be served, the SJA must notify, in writing, the confinement officer (or SFS/CC if no confinement officer/NCO is at that installation) of the conviction and sentence within 24 hours of announcement of the verdict. The corrections officer, or the SFS/CC, as appropriate, ensures that the notifications required in AFMAN 31-115, Vol 1 and AFMAN 71-102 are made.

29.8. Convictions by a Host Country. Service members, military dependents, DoD contractors, and DoD civilians can be convicted of a sex offense outside normal DoD channels by the host nation while assigned overseas. When compliance with **Section 29A** is required in these cases, the SJA notifies the confinement officer or SFS/CC, as required. It is the SJA's responsibility to ensure the offender completes their portion of the DD Form 2791, or equivalent document, upon release from the host nation. The DD Form 2791 and copies of the ROT must be provided to the appropriate federal, state, and local law enforcement in accordance with **paragraph 29.3** and **paragraph 29.4**, and DoDI 1325.07.

Section 29B—Criminal History Record Information (CHRI) and Fingerprint Collection and Submission (28 U.S.C. § 534, Acquisition, preservation, and exchange of identification records and information; appointment of officials; 28 C.F.R. §§ 20.30, et seq., Federal Systems and Exchange of Criminal History Record Information; DoDI 5505.11)

29.9. General Provision. The DAF, through OSI and Security Forces, submits offender CHRI and fingerprints to the FBI when there is probable cause to believe an identified individual committed a qualifying offense. **(T-0).** See AFMAN 71-102; DoDI 5505.11; 28 C.F.R. §§ 20.30, et seq.; and 28 U.S.C. § 534. Such data is submitted to and maintained in the Interstate Identification Index (III), maintained as part of the FBI's National Crime Information Center (NCIC).

29.10. Criminal History Record Information. CHRI reported in accordance with DoDI 5505.11 and AFMAN 71-102 consists of identifiable descriptions of individuals; initial notations of arrests, detentions, indictments, and information or other formal criminal charges; and any disposition arising from any such entry (e.g., acquittal, sentencing, NJP; administrative action; or administrative discharge).

29.11. Identified Individuals.

29.11.1. The DAF submits CHRI and fingerprints on any military member or civilian investigated by a DAF law enforcement agency (OSI or Security Forces) when a probable cause determination has been made that the member committed a qualifying offense.

29.11.2. The DAF submits criminal history data for military service members, military dependents, DoD employees, and contractors investigated by foreign law enforcement organizations for offenses equivalent to those described as qualifying offenses in AFMAN 71-102 and DoDI 5505.1 when a probable cause determination has been made that the member committed an equivalent offense.

29.12. Disposition Data. The DAF, through DAF-CJIC, OSI and Security Forces, is responsible for updating disposition data for any qualifying offense for which there was probable cause. This disposition data merely states what the ultimate disposition of any action (or no action) taken was regarding each qualifying offense. The disposition includes no action, acquittals, convictions, sentencing, NJP, certain administrative actions, and certain types of discharge. Failure to comply with this section will result in inaccurate disposition data, which can have adverse impacts on individuals lawfully indexed in III.

29.13. Qualifying Offenses. Qualifying offenses for fingerprinting requirements constitute either (1) serious offenses; or (2) non-serious offenses accompanied by a serious offense. See 28 CFR. 20.32. A list of offenses that, unless accompanied by a serious offense, do not require submission of data to III is located in AFMAN 71-102, Attachment 5.

29.14. Military Protective Orders. Issuance of an MPO also triggers a requirement for indexing in NCIC. See **paragraph 29.39** and AFMAN 71-102; 10 U.S.C. § 1567a, *Mandatory notification of issuance of military protective order to civilian law enforcement*.

29.15. Qualifying Offenses Investigated by Commander Directed Investigation (CDI). If any qualifying offense was investigated via CDI or inquiry and is subsequently preferred to trial by SPCM or GCM, then CHRI and fingerprints must be submitted to III in accordance with AFMAN 71-102 and DoDI 5505.11. SJAs must ensure they advise commanders as to the requirement to consult with SFS and OSI to obtain and forward CHRI and fingerprints in accordance with that mandate. **Note:** If charges are not preferred, then CHRI and fingerprints are not submitted to III; however, if charges are preferred and later withdrawn, CHRI and fingerprints must be submitted. **(T-0).**

29.16. Probable Cause Requirement. Fingerprints and criminal history data will only be submitted where there is probable cause to believe that a qualifying offense has been committed and that the person identified as the offender committed it. See AFMAN 71-102; DoDI 5505.11. The collection of fingerprints under this paragraph is administrative in nature and does not require a search authorization or consent of the person whose fingerprints are being collected.

29.17. SJA Coordination Requirement. The law enforcement agency (e.g., OSI or Security Forces) coordinates with the SJA or government counsel to determine whether the probable cause requirement is met for a qualifying offense. The SJA or government counsel must ensure they understand the applicable indexing requirements in order to advise OSI or Security Forces for purposes of criminal history indexing. **(T-0).**

29.18. Process for Submission of Criminal History Data. After the probable cause determination is made, the investigating agency (e.g., OSI or Security Forces) submits the required data in accordance with AFMAN 71-102 and DoDI 5505.11.

29.19. Legal Office Final Disposition Requirement.

29.19.1. The final disposition (e.g., conviction at GCM or SPCM, acquittal, dismissal of charges, conviction of a lesser included offense, sentence data, nonjudicial punishment, no action) is submitted by OSI or Security Forces for each qualifying offense reported in III or NCIC. OSI or Security Forces, whichever is applicable, obtains the final disposition data from the legal office responsible for advising on disposition of the case (generally the servicing base legal office). If an accused was arraigned at a court-martial, the final disposition is memorialized on the STR and EoJ. A first indorsement signed by the SJA must accompany the STR and EoJ.

29.19.2. The required format for the first indorsement is located on the VMJD.

29.19.3. The servicing legal office will provide disposition documentation to the local Security Forces, OSI, and DAF-CJIC within five duty days of completion of the documents discussed in paragraphs **29.19.4**-**29.19.7**.

29.19.4. Because the EoJ may differ from the adjudged findings and sentence, both the STR and EoJ must be distributed to the local DAF investigative agency that was responsible for the case (e.g., OSI or Security Forces) and DAF-CJIC within five duty days of completion of the EoJ.

29.19.5. For information regarding final disposition where the final disposition consists of NJP, see DAFI 51-202.

29.19.6. In cases where the allegations involve offenses listed in paragraphs **10.2.1.1**-**10.2.1.3**, and the convening authority decides not to go forward to trial, the GCMCA review must be forwarded to the local OSI detachment and DAF-CJIC in accordance with **paragraph 10.3.2** **Note:** Do not forward the sexual assault legal review, only the convening authority notification memorandum.

29.19.7. For all other final dispositions which must be submitted in accordance with **Section 29E**, AFMAN 71-102, and DoDI 5505.11, the SJA must ensure disposition data is provided to ensure timely and accurate inclusion of final disposition data. See **Section 29E** for further distribution guidance.

29.20. Expungement of Criminal History Data and Fingerprints. Expungement requests are processed in accordance with guidance promulgated in AFMAN 71-102.

Section 29C—DNA Collection (10 U.S.C. §

1565; DoDI 5505.14, DNA Collection and Submission Requirements for Law Enforcement)

29.21. General Provision. The DAF, through OSI and Security Forces, collects and submits DNA for analysis and inclusion in the Combined Deoxyribonucleic Acid Index System (CODIS), through the U.S. Army Criminal Investigations Laboratory (USACIL), when fingerprints are collected pursuant to DoDI 5505.11. **(T-0).** See DoDI 5505.14; 10 U.S.C. 1565; 34 U.S.C. §

40702, *Collection and use of DNA identification information from certain federal offenders*; 28 C.F.R. § 28.12, *Collection of DNA samples*.

29.22. Qualifying Offenses. DNA collection and submission is required when fingerprints are collected pursuant to DoDI 5505.11. DNA is not collected or submitted for the non-serious offenses enumerated in AFMAN 71-102, Attachment 5 unless they are accompanied by a serious offense requiring fingerprint collection in accordance with DoDI 5505.11.

29.23. Probable Cause Requirement. DNA collection occurs only where there is probable cause to believe that a qualifying offense has been committed and that the person identified committed it. The collection of DNA under this paragraph is administrative in nature and does not require a search authorization or consent of the person whose DNA is being collected.

29.24. SJA Coordination Requirement. The law enforcement agency (e.g., OSI or Security Forces) coordinates with the SJA or government counsel prior to submission of DNA for inclusion in CODIS in accordance with AFMAN 71-102. The SJA or government counsel must ensure they understand the applicable indexing requirements in order to advise OSI or Security Forces for purposes of criminal history indexing. **(T-0).**

29.25. Timing of Collection and Forwarding. OSI, Security Forces and Commanders (through collection by Security Forces) collect and expeditiously forward DNA in accordance with the procedures in DoDI 5505.14 and AFMAN 71-102. If not previously submitted to USACIL, the appropriate DAF law enforcement agency (i.e., OSI or Security Forces) will collect and submit DNA samples from service members: against whom court-martial charges are preferred in accordance with RCM 307 of the MCM; ordered into pretrial confinement after the completion of the commander's 72-hour memorandum required by RCM 305(h)(2)(C) of the MCM; and convicted by general or special court-martial.

29.26. STR and EoJ. In cases where specifications alleging qualifying offenses were referred to trial on or after 1 January 2019 and the accused is found guilty of one or more qualifying offenses, the appropriate box must be completed on the first indorsement of the STR and EoJ by the SJA.

29.27. Final Disposition Requirement. As DNA may be forwarded to USACIL at various times during the investigation or prosecution of a case, final disposition of court-martial charges must be forwarded to OSI and Security Forces to ensure DNA is appropriately handled.

29.27.1. The final disposition is memorialized on the following forms: STR and EoJ, whichever is applicable. A first indorsement signed by the SJA must accompany the STR and EoJ.

29.27.2. Formats for the STR, EoJ, and first indorsement are located on the VMJD.

29.27.3. In cases where the allegations involve offenses listed in paragraphs **10.2.1.1**-**10.2.1.3**, and the convening authority decides not to go forward to trial, the GCMCA review must be forwarded to OSI in accordance with **paragraph 29.19.6**.

29.27.4. For all other dispositions, the SJA must ensure disposition data for qualifying offenses is provided to ensure timely and accurate inclusion of final disposition data. Disposition documentation must be distributed to the local OSI detachment, Security Forces and DAF-CJIC within five duty days of completion of the final disposition. See **Section 29E** for further distribution guidance.

29.28. Expungement of DNA. DoD expungement requests are processed in accordance with guidelines promulgated in AFMAN 71-102 and DoDI 5505.14.

Section 29D—Possession or Purchase of Firearms Prohibited (18 U.S.C. § 921-922, Definitions; 27 C.F.R. § 478.11)

29.29. General Provision. 18 U.S.C. § 922, *Unlawful acts*, prohibits any person from selling, transferring or otherwise providing a firearm or ammunition to persons they know or have reasonable cause to believe fit within specified prohibited categories as defined by law. 18 U.S.C. § 922(g) prohibits any person who fits within specified prohibited categories from possessing a firearm. This includes the possession of a firearm for the purpose of carrying out official duties (e.g., force protection mission, deployments, law enforcement). Commanders may waive this prohibition for members of the Armed Forces for purposes of carrying out their official duties, unless the conviction is for a misdemeanor crime of domestic violence or felony crime of domestic violence, prohibited under 18 U.S.C. §§ 922(g)(9) and 922 (g)(1), respectively, as applied by DoDI 6400.06. For further guidance, see AFMAN 71-102. Persons who are prohibited from purchase, possession, or receipt of a firearm are indexed in the National Instant Background Check System (NICS).

29.30. Categories of Prohibition (18 U.S.C. §§ 922(g), 922(n); 27 C.F.R. § 478.11; AFMAN 71-102, Chapter 4).

29.30.1. Persons convicted of a crime punishable by imprisonment for a term exceeding one year.

29.30.1.1. If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved. **Note:** This category of prohibition would not apply to convictions in a special court-martial because confinement for more than one year cannot be adjudged in that forum.

29.30.1.2. If a conviction is set aside, disapproved or overturned on appeal, the prohibition under this section is not triggered because the conviction no longer exists. 18 U.S.C. § 922(g)(1).

29.30.2. Fugitives from justice. 18 U.S.C. § 922(g)(12).

29.30.3. Unlawful users or persons addicted to any controlled substance as defined in 21 U.S.C. § 802, *Definitions*. See 18 U.S.C. § 922(g)(3) and 27 C.F.R. 478.11.

29.30.3.1. This prohibition is triggered where a person who uses a controlled substance has lost the power of self-control with reference to the use of a controlled substance or where a person is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. See 27 C.F.R. 478.11.

29.30.3.2. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within

the past year; multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. 27 C.F.R. 478.11.

29.30.3.3. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, NJP, or an administrative discharge based on drug use or drug rehabilitation failure. 27 C.F.R. 478.11.

29.30.3.4. Qualifying Prohibitors. See AFMAN 71-102, Chapter 4, for additional information on drug offenses and admissions that qualify for prohibition under 18 USC 922(g)(3).

29.30.4. Any person adjudicated as a mental defective or who has been committed to a mental institution.

29.30.4.1. If a service member is found incompetent to stand trial or not guilty by reason of lack of mental responsibility pursuant to Articles 50a or 76b, UCMJ, this prohibition may be triggered. 18 U.S.C. § 922(g)(4).

29.30.4.2. SJAs should ensure commanders are aware of the requirement to notify DAF-CJIC when a service member is declared mentally incompetent for pay matters by an appointed military medical board. See AFMAN 71-102, Chapter 4.

29.30.4.3. SJAs should ensure commanders are aware of the requirement to notify installation law enforcement in the event any of their personnel, military or civilian, are committed to a mental health institution through the formal commitment process. For further information, see AFMAN 71-102; 18 U.S.C. § 922; 27 C.F.R. 478.11.

29.30.5. Persons who have been discharged from the Armed Forces under dishonorable conditions. 18 U.S.C. § 922(g)(6). This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List on the VMJD. **Note:** This prohibition does not take effect until after the discharge is executed, but no additional notification must be made to the individual at that time. See **paragraph 29.33.2.** The original notification via AF Form 177, *Notification of Qualification for Prohibition of Firearms*, Ammunition, and Explosives, and subsequent service of the Certification of Final Review or Final Order, as applicable, operate as notice to the individual.

29.30.6. Persons who have renounced their United States citizenship. 18 U.S.C. § 922(g)(7).

29.30.7. Persons convicted of a crime of misdemeanor domestic violence (the "Lautenberg Amendment") at a GCM or SPCM. See 18 U.S.C. § 922(g)(9). **Note**: Persons convicted of felony crimes of domestic violence at a GCM or SPCM are covered under 18 U.S.C. § 922(g)(1).

29.30.7.1. A "misdemeanor crime of domestic violence" for purposes of indexing under this section is defined as follows: an offense that— (i)is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or

guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. Note: Exceptions to this definition can be located at 18 USC § 921(g)(33). See also 27 CFR 478.11.

29.30.7.2. SJAs should look at the underlying elements of each conviction to determine whether it triggers a prohibition under 18 U.S.C. § 922(g)(9). If a conviction is set aside, disapproved or overturned on appeal, the prohibition under this section is not triggered because the conviction no longer exists. The term "qualifying conviction" does not include summary courts-martial or the imposition of NJP under Article 15, UCMJ.

29.30.7.3. Government counsel and law enforcement must look at this prohibition on a case-by-case basis to ensure that the charged offense (e.g., violations of Articles 120, 120b, 128, 128b, 130, UCMJ, etc.) meets the statutory criteria for a "misdemeanor crime of domestic violence." See 10 U.S.C. § 1562; DoDI 6400.07.

29.30.8. Persons accused of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial. 18 U.S.C. § 922(n).

29.30.9. Persons who are aliens admitted under a nonimmigrant visa or who are unlawfully in the United States. 18 U.S.C. § 922(g)(5).

29.30.10. Persons subject to a protective order issued by a court, provided the criteria in 18 U.S.C. § 922(g)(8) are met. This prohibition is triggered only by a court order issued by a judge. A military protective order does not trigger this prohibition; but does trigger indexing under **Section 29B.**

29.31. Notification to the Accused of Firearms Prohibition. When a service member becomes ineligible to possess, purchase, or receive a firearm under 18 U.S.C. § 922, the DAF provides notification to that service member of the prohibition. See AFMAN 71-102, Chapter 4.

29.31.1. **Form of Notice.** A service member is notified of the applicability of 18 U.S.C. § 922 via AF Form 177.

29.31.2. **SJA Responsibility to Notify.** In all cases investigated by DAF involving an offense which implicates a firearms prohibition, the SJA must be aware of the nature of the prohibition and the entity responsible for making the notification. See AFMAN 71-102, Table 4.1 and Chapter 4, generally. However, in the following cases, the SJA is responsible for ensuring the notification to the accused is made:

29.31.2.1. Conviction at a GCM of any offense punishable by imprisonment for a term exceeding one year. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.2. Conviction at a GCM, SPCM, or SCM for use or possession of a controlled substance. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.3. Completion of NJP for any person found guilty of wrongful use or possession of a controlled substance. In such cases, the AF Form 177 should be provided to the accused for signature on or before completion of the supervisory SJA legal review.

29.31.2.4. After the accused is adjudicated as not guilty by reason of insanity or not competent to stand trial. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork.

29.31.2.5. Conviction resulting in a sentence including a dishonorable discharge. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.6. Conviction at a GCM or SPCM for a crime of domestic violence, when the maximum punishment which may be adjudged for the offense in that forum is one year or less. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.7. Referral of charges to a GCM where any offense carries a possible sentence to confinement in excess of one year. In such cases, the AF Form 177 may be provided to the accused for completion as part of the referral paperwork.

29.31.3. Practitioners are encouraged to deconflict with the local investigating DAF law enforcement agency in cases where law enforcement is also responsible for ensuring notification (i.e., where multiple prohibitions attached and law enforcement may be providing notification of any prohibition).

29.31.4. In cases where the investigating law enforcement agency is a non-DAF agency, these requirements may not apply. Contact DAF-CJIC for further guidance. See AFMAN 71-102.

29.31.5. Any notification made to the accused may be made through the accused's counsel.

29.31.6. If the accused declines to sign, this should be annotated on the form.

29.31.7. After completion of the form, the SJA must provide a copy of the completed AF Form 177 to DAF-CJIC within 24 hours of completion via email: **daf.cjic@us.af.mil**. The SJA will also provide a digital copy to the member's commander and investigating DAF law enforcement. The legal office will forward the original and signed AF Form 177 via mail to DAF-CJIC, where it will be maintained as part of the official record. See AFMAN 71-102, Chapter 4.

29.32. STR and EoJ. In cases where specifications allege offenses which trigger a prohibition under 18 U.S.C. § 922 and the accused is found guilty of one or more such offenses, the appropriate box must be completed on the first indorsements to the STR and EoJ by the SJA. **Note:** If the accused is convicted of a crime of domestic violence as defined in paragraph **29.30.7.1** and **18** U.S.C. § 922, both the "Firearms Prohibition" and "Domestic Violence Conviction" blocks should be marked "yes."

29.33. Final Disposition Requirement. As the findings of a case may change after close of a court-martial, final disposition of court-martial charges must be forwarded to the local OSI detachment, Security Forces, and DAF-CJIC to ensure reporting pursuant to 18 U.S.C. §§ 921-922 is appropriately handled. Because the EoJ may differ from the adjudged findings and sentence, both the STR and EoJ, with accompanying first indorsements, must be distributed to the local

responsible DAF investigative agency and DAF-CJIC within five duty days of completion of the EoJ. Templates for the STR, EoJ, and first indorsement are located on the VMJD. The SJA must ensure disposition data requested by the local OSI detachment and Security Forces unit is provided to ensure timely and accurate inclusion of final disposition data. See **Section 29E** for further distribution guidance.

29.34. SJA Coordination with Commanders. The SJA or designee must inform commanders of the impact of the conviction on the accused's ability to handle firearms or ammunition as part of their official duties; brief commanders on retrieving all Government-issued firearms and ammunition and suspending the member's authority to possess Government-issued firearms and ammunition in the event a member is convicted of an offense of misdemeanor domestic violence (violations of the Lautenberg Amendment); and brief commanders on their limitations and abilities to advise members of their commands to lawfully dispose of their privately owned firearms and ammunition.

Section 29E—Distribution of Court-Martial Data for Indexing Purposes

29.35. General Provision. In order to ensure that indexing requirements pursuant to this chapter are met, SJAs must ensure the following documents are distributed to the applicable local DAF law enforcement agency and DAF-CJIC:

29.35.1. Charge sheets in cases referred to general courts-martial, where any charged offense has a possible sentence to confinement greater than one year;

29.35.2. STR, regardless of verdict or sentence, where any charged offense qualifies for any type of indexing discussed in this chapter;

29.35.3. EoJ and first indorsement, regardless of verdict or sentence, where any charged offense qualifies for any type of indexing discussed in this chapter;

29.35.4. In SCMs for drug use or possession that would trigger firearm prohibitions, the final completed DD Form 2329 and first indorsement;

29.35.5. Certification of Final Review in any case where any offense qualifies for any type of indexing discussed in this chapter;

29.35.6. Notification of outcome of any cases as to qualifying offenses litigated at or disposed of via magistrate court;

29.35.7. Order pursuant to Article 73, UCMJ, for a new trial, where any charged offense qualifies for any type of indexing discussed in this chapter;

29.35.8. Order for a rehearing on the findings or sentence of a case, pursuant to Article 63, UCMJ and

29.35.9. Other final disposition documentation in cases not referred to trial where the offense investigated is a qualifying offense under **Sections 29B-D** of this chapter (e.g., decision not to refer certain sexual assault offenses to trial in accordance with **paragraph 10.2**; NJP records in accordance with DAFI 51-202; notification of administrative discharge where the basis is a qualifying offense; approval of a request for resignation or retirement in lieu of trial by court-martial, administrative paperwork for drug use or possession).